(5)

No. 05-7058
Title: Lorenzo L. Jones, Petitioner
v.
Barbara Bock, Warden, et al.
Docketed: October 19, 2005
Lower Ct: United States Court of Appeals for the Sixth Circuit
Case Nos.: (03-2576)
Decision Date: June 15, 2005
Questions Presented

Date	Proceedings and Orders
Aug 29 2005	Application (05A210) to extend the time to file a petition for a writ of certiorari from September 13, 2005 to October 13, 2005, submitted to Justice Stevens.
Sep 2 2005	Application (05A210) granted by Justice Stevens extending the time to file until October 13, 2005.
Oct 13 2005	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due November 18, 2005)
Nov 7 2005	Waiver of right of respondents Barbara Bock, Warden, et al. to respond filed.
Nov 14 2005	Supplemental brief of petitioner Lorenzo L. Jones filed.
Nov 17 2005	Brief amici curiae of D.C. Prisoners' Legal Services Project Inc., et al. filed.
Dec 1 2005	DISTRIBUTED for Conference of January 6, 2006.
Dec 7 2005	Response Requested . (Due January 6, 2006)
Dec 14 2005	Order extending time to file response to petition to and including February 6, 2006.
Feb 6 2006	Brief of respondents Barbara Bock, Warden, et al. in opposition filed.
Feb 16 2006	DISTRIBUTED for Conference of March 3, 2006.
Feb 23 2006	Reply of petitioner Lorenzo L. Jones filed. (Distributed)
Mar 6 2006	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED and this case is consolidated with No. 05-7142, and a total of one hour is allotted for oral argument.
Mar 16 2006	Motion to appoint counsel filed by petitioner Lorenzo L. Jones.
Mar 21 2006	Consent to the filing of amicus briefs in support of either party received from counsel for the respondents. VIDED.
Mar 23 2006	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioners. VIDED.
Mar 27 2006	Extension of time within which to file the the joint appendix and petitioners' briefs on the merits to and including 45 days from the date on which the Court renders its decision in No. 05-416, Woodford v. Ngo. VIDED.
Mar 29 2006	Motion DISTRIBUTED for Conference of April 14, 2006.
Apr 17 2006	Motion to appoint counsel filed by petitioner GRANTED. Jean-Claude Andre, Esquire, of Los Angeles, California is appointed to serve as counsel for the petitioner in this case.
Jul 17 2006	Application (06A78) to file the briefs on the merits in excess of page limits, submitted to Justice Stevens. VIDED.
Jul 18 2006	Application (06A82) of ACLU to file a consolidated amicus brief in excess of page limits, submitted to Justice Stevens. VIDED.
Jul 21 2006	Application (06A90) of the Solicitor General to file a consolidated brief in excess of page

	limits, submitted to Justice Stevens. VIDED.
Jul 25 2006	Application (06A82) of the ACLU to file a consolidated amicus curiae brief in excess of page limits granted by Justice Stevens. The brief may not exceed 45 pages.
Jul 25 2006	Application (06A78) of the parties to file consolidated briefs on the merits in excess of page limits granted by Justice Stevens. The petitioners' and respondents' opening briefs on the merits may not exceed 80 pages. The petitioners' reply brief on the merits may not exceed 36 pages.
Jul 27 2006	Application (06A90) of the Solicitor General to file a consolidated amicus curiae brief in excess of page limits granted by Justice Stevens. The brief may not exceed 50 pages.
Aug 2 2006	Further extension of time within which to file the joint appendix and petitioners' brief on the merits to and including August 14, 2006. VIDED.
Aug 14 2006	SET FOR ARGUMENT on Monday, October 30, 2006.
Aug 14 2006	Brief amici curiae of American Civil Liberties Union, et al. filed. VIDED.
Aug 14 2006	Brief of petitioner Lorenzo L. Jones filed. VIDED.
Aug 14 2006	Joint appendix filed. VIDED. (Jt. appendix in two volumes).
Sep 13 2006	CIRCULATED.
Sep 18 2006	Brief amici curiae of New York, et al. filed. VIDED. (Distributed)
Sep 18 2006	Brief of respondents Barbara Bock, Warden, et al. filed. VIDED. (Distributed)
Sep 20 2006	Record received from U.S.C.A. for the Sixth Circuit. (1 binder)
Oct 16 2006	Record received from U.S.D.C. Eastern District of Michigan (Detroit). (1 envelope)
Oct 23 2006	Reply of petitioner Lorenzo L. Jones filed. (Distributed) VIDED.
Oct 30 2006	Argued. For petitioners: Jean-Claude Andre, Los Angeles, Cal. (Appointed by this Court.) For respondents: Linda M. Olivieri, Assistant Attorney General, Lansing, Mich.

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No. 05-7058

Filed
Oct 13 2005

IN THE

Supreme Court of the United States

Lorenzo L. Jones,

Petitioner,

v.

Barbara Bock et al.,

Respondents.

ORIGINAL

On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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October 13, 2005

QUESTIONS PRESENTED

42 U.S.C. § 1997e(a) of the Prison Litigation Reform Act of 1995 (PLRA), Pub. L. 104-134, 110 Stat. 1321 (1996), provides that "[n]o action shall be brought with respect to prison conditions" under 42 U.S.C. § 1983 or other federal law "until such administrative remedies as are available are exhausted." "[E]xhaustion in cases covered by § 1997e(a) is * * * mandatory." *Porter v. Nussle*, 534 U.S. 516, 524 (2002). The questions presented, over both of which the circuits are intractably split, are:

1. Whether satisfaction of the PLRA's exhaustion requirement is a prerequisite to a prisoner's federal civil rights suit such that the prisoner must allege in his complaint how he exhausted his administrative remedies (or attach proof of exhaustion to the complaint), or instead, whether non-exhaustion is an affirmative defense that must be pleaded and proven by the defense.

2. Whether the PLRA prescribes a "total exhaustion" rule that requires a federal district court to dismiss a prisoner's federal civil rights complaint for failure to exhaust administrative remedies whenever there is a single unexhausted claim, despite the presence of other exhausted claims.

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, Valerie A. Chaplin, Paul Morrison, Michael Opanasenko, Janet Konkle, and Ahmad Aldabagh were defendants below and are respondents here.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Lorenzo L. Jones respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (Pet. App. 1a-3a) is unreported but is *available at* 135 Fed. Appx. 837. The order of the district court (Pet. App. 4a-6a) and the report and recommendation of the magistrate judge (Pet. App. 7a-25a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 2005. Justice Stevens extended the time for Petitioner to file this petition to and including October 13, 2005. App. No. 05A210. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

Section 1997e(a) of the Prison Litigation Reform Act of 1995, Pub. L. 104-134, 110 Stat. 1321 (1996), provides:

> Applicability of administrative remedies. No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

STATEMENT

This case presents two important and recurring questions over which the courts of appeals are avowedly split regarding application how federal courts should apply the exhaustion requirement of the Prison Litigation Reform Act of 1995 (PLRA), Pub. L. No. 104-134, 110 Stat. 1321 (1996), at the pleading stage.

The first question presented – whether satisfaction of the PLRA's exhaustion requirement is a prerequisite to a prisoner's federal civil rights suit such that the prisoner must allege in his complaint how he exhausted his administrative remedies (or attach proof of exhaustion to the complaint), or instead, whether non-exhaustion is an affirmative defense that must be pleaded and proven by the defense – has resulted in a 3-7 division among the ten federal courts of appeals that have addressed the issue.

The second question presented – whether the PLRA prescribes a "total exhaustion" rule that requires a federal district court to dismiss a prisoner's federal civil rights complaint for failure to exhaust administrative remedies whenever there is a single unexhausted claim, despite the presence of other exhausted claims – has resulted in a 3-1-3 division among the seven federal courts of appeals that have addressed the issue.

Because these circuit splits will not go away absent this Court's intervention, because these issues affect thousands of prisoner civil rights suits each year, and because the Sixth Circuit's decision in this case is plainly wrong, review by this Court is warranted.

A. Statutory Background

Prior to 1996, the requirement that a prisoner exhaust administrative remedies before commencing an action under 42 U.S.C. § 1983, was "in large part discretionary." *Porter v.*

Nussle, 534 U.S. 516, 523 (2002). The then-governing statute authorized a district court, if it "believe[d] that such a requirement would be appropriate and in the interests of justice," to stay the prisoner's action for a period not to exceed 180 days while the prisoner exhausted administrative remedies. Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, 94 Stat. 352 (1980), *as amended*, 42 U.S.C. § 1997e (1994). This Court described this provision as a "limited exhaustion requirement." *McCarthy v. Madigan*, 503 U.S. 140, 150-51 (1992).

In the PLRA, Congress amended the exhaustion prescription. 42 U.S.C. § 1997e(a) now provides that "[n]o action shall be brought with respect to prison conditions"[1] under 42 U.S.C. § 1983 or other federal law "until such administrative remedies as are available are exhausted." Thus, "exhaustion in cases covered by § 1997e(a) is now mandatory." *Porter*, 534 U.S. at 524.

B. The Sixth Circuit's Heightened Pleading Requirements for PLRA Plaintiffs

Shortly after Congress amended PLRA §1997e, the Sixth Circuit began to read the PLRA's mandatory exhaustion prescription as requiring heightened pleading standards for PLRA plaintiffs. Because the opinions below applied these heightened standards to dismiss petitioner's complaint, we provide a brief discussion of their genesis here.

Relevant to the first question presented, in *Brown v. Toombs*, 139 F.3d 1102 (CA6), *cert. denied*, 525 U.S. 833 (1998), the Sixth Circuit held "that prisoners filing § 1983 cases involving prison conditions must allege and show that they have exhausted all available state administrative remedies. A prisoner should attach to his § 1983 complaint the administrative decision, if it is available, showing the administrative disposition of his complaint." *Id.* at 1104.

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[1] "Prison conditions" suits comprise "all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." *Porter*, 534 U.S. at 532.

Brown further admonished district courts within the Sixth Circuit to "enforce th[is] exhaustion requirement *sua sponte* if not raised by the defendant." *Id.* In *Knuckles-El v. Toombs*, 215 F.3d 640 (CA6), *cert. denied*, 531 U.S. 1040 (2000), the Sixth Circuit reiterated that, if written documentation of exhaustion is unavailable to a PLRA plaintiff at the time they file their complaint, they must "describe with specificity the administrative proceeding and its outcome" to avoid dismissal under *Brown*. *Id.* at 642. In *Baxter v. Rose*, 305 F.3d 486 (CA6 2002), the Sixth Circuit clarified "that a [PLRA] plaintiff, who fails to make a sufficient allegation of exhaustion in their initial complaint [as required by *Brown* and *Knuckles-El*,] not be allowed to amend his complaint to cure the defect." *Id.* at 489. As discussed *infra*, these heightened pleading requirements have been embraced by two additional circuits but rejected by seven others.

Relevant to the second question presented, in *Jones Bey v. Johnson*, 407 F.3d 801 (CA6 2005), the Sixth Circuit held that "the PLRA's exhaustion requirement applies such that a 'mixed' complaint, alleging both exhausted and unexhausted claims, must be completely dismissed for failure to exhaust administrative remedies." *Id.* at 805; *see also id.* at 806 ("We now * * * hold[] that total exhaustion is required under the PLRA."). As discussed *infra*, the total exhaustion rule adopted by *Jones Bey* is consistent with the rules or practices in two circuits but inconsistent with the rules or practices in four others.

C. Factual and Procedural Background[2]

1. On November 14, 2000, petitioner was in a motor vehicle accident while he was in the custody of the Michigan Department of Corrections ("MDOC"). *See* Pet. App. 1a. As a

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[2] The facts as stated in this petition are taken from the decisions below, which in turn were taken from the allegations in petitioner's complaint, all of which are assumed true on appeal from a motion to dismiss. *See Swierkiewicz v. Sorema, N. A.*, 534 U.S. 506, 508 n.1 (2002).

result of the accident, petitioner suffered a handful of serious injuries, including a cervical spine fracture and dislocation with injury to the spinal cord, which required fusion surgery; a broken arm; lower back injuries; upper and lower extremity weakness on his left side; and numbness below his neck. *See id.* at 8a. Approximately seven months after the accident – but while petitioner was still wearing neck and leg braces, utilizing a walking cane, and medicated with a muscle relaxant – respondent Morrison assigned petitioner to work as a "Big Yard Equipment Handler" at his institution. *See id.* This position required petitioner to lift items, stand, bend, stoop, and distribute athletic equipment to other inmates. *See id.* Petitioner notified Morrison and the officer to whom petitioner was ordered to report, respondent Opanasenko, of his injuries, but his assignment was not changed. *See id.* Reluctantly, petitioner reported to his work assignment but aggravated his injuries while attempting to complete his duties. *See id.* at 8a-9a. Opanasenko accused petitioner of faking his injuries; threatened petitioner with discipline if he did not perform his duties satisfactorily; repeatedly harassed petitioner; and in retaliation for complaining about his injuries, issued petitioner a negative work evaluation. *See id.*

2. On September 15, 2001, petitioner filed a grievance[3] against Morrison, Opanasenko, and four other MDOC employees – (1) respondent Bock, the institution's warden; (2) respondent Chaplin, the institution's deputy warden in charge of approving work

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[3] A Michigan prisoner's administrative remedies are set forth at Michigan Department of Corrections Policy Directive ("MDOC PD") No. 03.02.130 (October 11, 1999), which provides for a three-level written grievance procedure to be used after a prisoner attempts to verbally resolve an issue. At Step I, the prisoner files a written grievance with the Step I grievance coordinator, who assigns someone to respond. *See* MDOC PD No. 03.02.130(T). If the prisoner does not receive a timely response or is dissatisfied with the response at Step I, the prisoner may file a Step II appeal with the Step II grievance coordinator. *See id.* Likewise, if the prisoner does not receive a timely Step II response or is dissatisfied with the response, the inmate may file a Step III appeal with MDOC's Prisoner Affairs Section. *See id.*

assignments; (3) respondent Konkle, one of the institution's registered nurses; and (4) respondent Aldabaugh, one of the institution's physicians – all of whom petitioner alleged were deliberately indifferent to his medical needs by allowing petitioner's work assignment. *See id.* at 42a-43a. Petitioner also alleged that Opanasenko harassed and retaliated against petitioner for complaining about his injuries. *See id.* Petitioner's two-page typewritten grievance described the underlying incidents and referred to respondents either by name or, where their name was unknown to petitioner, by title. *See id.* Petitioner received an undated denial of his grievance. *See id.* at 44a. On October 11, 2001, petitioner appealed his grievance to Step II, *see id.* at 46a, and received from respondent Bock on October 30, 2001, a response "partially resolv[ing]" the grievance, *see id.* at 47a. Dissatisfied with Bock's "partial[] resol[ution]" at Step II, petitioner appealed his grievance to Step III on November 3, 2001. *See id.* at 48a-49a. On December 11, 2001, the MDOC issued its response, affirming the responses at Steps I and II. *See id.* at 50a.

3. Dissatisfied with the resolution of his grievance, on November 15, 2002, proceeding *pro se*, petitioner filed a 42 U.S.C. § 1983 federal civil rights complaint in the United States District Court for the Eastern District of Michigan. *See id.* at 7a. Petitioner's complaint named all six respondents,[4] the State of Michigan, and the MDOC as defendants and alleged violations of his First, Eighth, and Fourteenth Amendment rights.[5] *See id.* at 1a, 7a. Specifically, petitioner alleged that all six respondents were deliberately indifferent to his medical needs in

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[4] In his complaint, petitioner named respondents Konkle and Aldabaugh as Doe defendants. *See* Pet. App. 9a n.2. Subsequently, petitioner moved to substitute Konkle and Aldabaugh for the Doe defendants, and on January 17, 2003, the district court granted petitioner's motion. *See id.*

[5] On November 19, 2002, the district court dismissed the State of Michigan and the MDOC because they were entitled to Eleventh Amendment immunity. *See* Pet. App. 9a. Petitioner does not challenge this ruling.

violation of the Eighth and Fourteenth Amendments; that the Opanasenko and Chaplin also violated his First Amendment rights by retaliating against him for complaining about his injuries; and that the MDOC and State of Michigan were liable under a respondeat superior theory of liability. *See id.* at 9a. Petitioner's complaint stated that he exhausted all administrative remedies available to him and provided the dates on which he filed his Step I grievance and his Step II and Step III appeals and the dates on which he received the institution's responses at each step. *See id.* at 1a, 5a. Petitioner did not attach copies of any of the documents from his grievance and appeals and did not describe the remedies he pursued or the outcome of the administrative proceedings. *See id.* at 1a-2a, 5a, 16a.

4. On February 13, 2003, respondents moved to dismiss petitioner's complaint. *See id.* at 26a-35a. Respondents conceded that petitioner exhausted his First Amendment retaliation claim against Opanasenko. *See id.* at 32a. Notwithstanding this concession, respondents argued that the entirety of petitioner's complaint should be dismissed because petitioner neither attached to his complaint copies of his grievance, his appeal forms, and the MDOC's responses, nor, in the absence of providing proof of exhaustion, described with sufficient particularity how he exhausted his administrative remedies as required by the Sixth Circuit in *Knuckles-El* and *Baxter*. *See id.* at 9a, 30a-31a. Respondents attached to their motion copies of petitioner's grievance, his appeal forms, and the MDOC's responses. *See id.* at 16a-17a. On February 21, 2003, petitioner opposed respondents' motion and attached to his opposition the proof of exhaustion that he had failed to attach to his complaint but that respondents had provided with their motion. *See id.* at 16a, 36a-51a. On March 18, 2003, the district court referred respondents' motion to a magistrate judge for a report and recommendation. *See id.* at 20a.

5. The magistrate judge recommended that petitioner's claims against Bock, Chaplin, Konkle, and Aldabaugh be dismissed for failure to state a claim because petitioner failed to assert that any of them knew or should have known that petitioner's work assignment would place him at a serious risk of harm. *See id.* at 14a; *see also id.* at 4a. In contrast, the magistrate judge recommended that petitioner's claims against Morrison and Opanasenko should not be dismissed because petitioner stated claims against them and exhausted his administrative remedies as to those claims. *See id.* at 20a-24a; *see also id.* at 4a.

The magistrate rejected respondents' argument that the entirety of petitioner's complaint should be dismissed because petitioner failed to attach to his complaint proof of exhaustion or describe with particularity in his complaint how he exhausted his claims. *See id.* at 20a. The magistrate noted that the Sixth Circuit's heightened pleading requirements for PLRA plaintiffs were designed to help district courts determine expeditiously whether PLRA plaintiffs exhausted their claims. *See id.* at 19a. Nevertheless, the magistrate found the heightened pleading requirements inapplicable to this case. *See id.* at 19a-20a. According to the magistrate, *who* provided proof of exhaustion and *how* it was provided were irrelevant because it was present in the record by the time the case was referred to him for evaluation and because the court's ability to evaluate the case expeditiously was unaffected. *See id.* at 20a. In essence, the magistrate found that, by providing proof of exhaustion with their motion to dismiss, respondents cured -- or rendered harmless – petitioner's pleading error. *See id.*

Accordingly, the magistrate found *Baxter* inapposite. *See id.* at 18a-19a. Petitioner and both Morrison and Opanasenko filed objections to the magistrate's report and recommendation. *See id.* at 4a.

6. Reviewing the magistrate's report and recommendation *de novo*, the district court dismissed petitioner's complaint in its entirety. The district court adopted the magistrate's recommendation that petitioner's claims against Bock, Chaplin, Konkle, and Aldabaugh should be dismissed but overruled his recommendation that petitioner's claims against Morrison and Opanasenko should go forward. *See id.* at 5a. Unlike the magistrate, the district court relied on *Baxter* and found that "the documentation regarding grievances supplied by [respondents] as part of their motion to dismiss does not cure [petitioner's] failure to properly plead exhaustion." *Id.* at 6a. The district court also found that petitioner's attachment of proof of exhaustion to his opposition did not cure his pleading failure. *See id.* at 5a-6a. In particular, the district court construed petitioner's late provision of proof of exhaustion as an attempt to amend his complaint and, relying on *Baxter*, held that Sixth Circuit law prohibited PLRA plaintiffs from doing so. *See id.* at 6a. Petitioner appealed.

7. The Sixth Circuit affirmed, finding that the district court's dismissal of petitioner's complaint was proper for two reasons. First, rather than consider petitioner's challenge to the district court's dismissal of his claims against Bock, Chaplin, Konkle, and Aldabaugh for failure to state a claim, the Sixth Circuit held that petitioner's failure to comply with its heightened pleading requirement for PLRA plaintiffs was fatal to his *entire* complaint. *See id.* at 3a. Like the district court, the Sixth Circuit also held that *Baxter* precluded petitioner from offering proof of exhaustion by attaching it to his opposition to respondents' motion to dismiss. *See id.* at 2a-3a. Relying on *Jones Bey*, the Sixth Circuit held alternatively that, "even if Jones had shown he had exhausted some of his claims, the district court properly dismissed the complaint because Jones did not show that he had exhausted all of his claims." *See id.* at 3a.

8. This petition followed.

REASONS FOR GRANTING THE WRIT

In 2004 nationwide, prisoners brought 23,449 prison-condition and civil rights suits against state and federal correctional officials.[6] Administrative Office of the U.S. Courts, Judicial Facts and Figures: Multi-year Statistical Compilations of Federal Court Caseload Through Fiscal Year 2004, tbl. 2.2 (2005), http://www.uscourts.gov/judicialfactsfigures/alljfftables.pdf. These filings comprised over 8% of the civil cases filed, outnumbering every other category including habeas filings, *compare id. with id.* tbl. 2.1, and over 6.5% of all cases filed (civil and criminal) in the nation's district courts in 2004, *compare id.* tbl. 2.2 *with id.* tbl. 4.1.

The first question presented involves an issue relevant to every one of the over 20,000 PLRA complaints filed each year because the issue affects how every PLRA plaintiff in the country must plead their prison condition claims. Although we know of no statistics indicating the number of PLRA suits involving the second question presented, the number is, likewise, clearly immense and affects every PLRA plaintiff who brings properly exhausted claims, yet unwittingly – and likely due to their *pro se* status, lack of legal training, and lack of access to the most current legal materials – adds unexhausted claims to their complaint. Thus, each Term that this Court waits to resolve the issues presented in this petition, hundreds – if not, thousands – of PLRA plaintiffs bringing properly exhausted prison condition claims will lose their opportunity to test the merits of their claims in federal court. Because of these staggering numbers, this

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[6] Historical caseload profiles are *available at* http://www.uscourts.gov and in John Scalia, U.S. Dep't of Justice, PRISONER PETITIONS FILED IN U.S. DISTRICT COURTS, 2000, WITH TRENDS 1980-2000 (rev'd ed. 2002), http://www.ojp.usdoj.gov/bjs/pub/pdf/ppfusd00.pdf.

Court's prompt articulation of national PLRA pleading standards is required.

A. The Federal Courts of Appeals Are Irreconcilably Split Over Whether Non-Exhaustion Is an Affirmative Defense To Be Raised Defendants or Whether Proof of Exhaustion Is a Prerequisite to Suit that Must Be Established by a PLRA Plaintiff's Complaint

There can be no doubt that the federal courts of appeals are deeply and avowedly split on the first question presented by this petition and that this circuit split merits resolution. The ten federal courts of appeals that have resolved the issue fall into two distinct camps, creating a 3-7 split that requires this Court's intervention.

Three courts – the Sixth, Tenth, and Eleventh Circuits – have held that exhaustion is a prerequisite to suit that PLRA plaintiffs must allege in their complaints to avoid dismissal.[7] As already outlined *supra*, the "heightened pleading standard," *Baxter*, 305 F.3d at 489, applied by the Sixth Circuit in this case requires "that prisoners filing § 1983 cases involving prison conditions must allege and show that they have exhausted all available state administrative remedies. A prisoner should attach to his § 1983 complaint the administrative decision, if it is available, showing the administrative disposition of his complaint," *Brown*, 139 F.3d at 1104; *see also Knuckles-El*, 215 F.3d at 642 ("[A] prisoner must plead his claims with specificity and show that they have been exhausted by attaching a copy of the applicable administrative dispositions to the complaint or, in the absence of written documentation, describe with specificity the administrative proceeding and its outcome."). Shortly after the Sixth Circuit decided *Brown*, the

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[7] The Fifth Circuit has suggested but not conclusively held that exhaustion must be pleaded by PLRA plaintiffs to avoid dismissal. *See Johnson v. Johnson*, 385 F.3d 503, 516 n.7 (CA5 2004) (noting that some of the court's prior decisions "imply or assume that exhaustion is a component of the plaintiff's claim, not an affirmative defense that must be raised and proved by the defendants"); *but cf. Wendell v. Asher*, 162 F.3d 887, 890 (CA5 1998) (holding that PLRA exhaustion "imposes a requirement, rather like a statute of limitations, that may be subject to certain defenses such as waiver, estoppel, or equitable tolling.").

Eleventh Circuit rendered a nearly identical holding in *Rivera v. Allin*, 144 F.3d 719 (CA 11), *cert. dismissed*, 524 U.S. 978 (1998). In *Rivera*, the Eleventh Circuit reviewed the district court's dismissal of the plaintiff's complaint for failure to assert "any allegations of exhaustion of remedies." *Id.* at 731. Finding no fault with the district court's dismissal, the Eleventh Circuit held that "[a] claim that fails to allege the requisite exhaustion of remedies is tantamount to one that fails to state a claim upon which relief may be granted," thereby rendering exhaustion a prerequisite to suit that PLRA plaintiffs must allege in their complaints. *Id.* Finally, in *Steele v. Federal Bureau of Prisons*, 355 F.3d 1204 (CA10 2003), *cert. denied*, 125 S.Ct. 344 (2004), the Tenth Circuit followed the First Circuit's decision in *Rivera* and the Sixth Circuit's decision in *Knuckles-El*, rejected "exhaustion as an affirmative defense," and adopted the Sixth Circuit's heightened pleading requirement for PLRA plaintiffs.[8] *Id.* at 1210 (citations omitted).

These courts have reasoned, in essence, that because exhaustion is mandatory under the PLRA, it must be a pleading requirement. For example, in *Steele*, the Tenth Circuit reasoned that its

> conclusion is compelled by the Supreme Court's emphasis [in *Porter*] on the mandatory nature of exhaustion, implications of the PLRA statutory scheme, the structure of the Rules of Civil Procedure and our own precedent. We decline to characterize exhaustion as an affirmative defense because it cannot be waived. "Under Federal Rule of Civil Procedure 8(c), a failure to plead an affirmative defense results in a waiver of that defense."
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> * * * *
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> [C]lassification of the PLRA's exhaustion requirement as an affirmative defense means that defendants may choose to ignore it for their own strategic reasons. This court, however, has warned against "trivializing the Supreme Court's holding

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[8] As we discuss *infra*, *Steele*'s adoption of the Sixth Circuit's heightened pleading standard was likely *dicta*. Since then, however, the Tenth Circuit has resolved any doubts over whether it is law of the circuit. *See, e.g., Fitzgerald v. Corr. Corp. of Am.*, 403 F.3d 1134, 1139 (CA10 2005) (applying *Steele*); *Ross v. City of Bernalillo*, 365 F.3d 1181, 1184-85 (CA10 2004) (same).

* * * that exhaustion is now mandatory."

Steele, 355 F.3d at 1209 (citations omitted). The Sixth Circuit's analysis of the issue was significantly more abbreviated, yet concerns similar to those articulated by the Tenth Circuit appear to have guided its holdings. *See Brown*, 139 F.3d at 1104 ("In light of the plain mandatory language of the statute regarding exhaustion of remedies, the legislative purpose underlying the plain language, and the sound policy on which it is based, this court will henceforth require that prisoners filing § 1983 cases involving prison conditions must allege and show that they have exhausted all available state administrative remedies."); *see also Knuckles-El*, 215 F.3d at 642 (explaining that the rule announced in *Brown* was necessary because the PLRA provides that "no action shall be brought until all available administrative remedies are exhausted" and requiring plaintiff to allege exhaustion permits the district court to "intelligently decide if the issues raised can be decided on the merits").

In contrast, seven courts – the First, Second, Third, Fourth, Seventh, Eighth, and Ninth Circuits – have held that a PLRA plaintiff's alleged failure to exhaust his administrative remedies is an affirmative defense to be raised by defendants.[9] *See Casanova v. Dubois*, 304 F.3d 75, 77 (CA1 2002); *Jenkins v. Haubert*, 179 F.3d 19, 28-29 (CA2 1999);[10] *Ray v. Kertes*, 285 F.3d 287, 295 (CA3 2002); *Anderson v. XYZ Corr. Health Servs., Inc.*, 407 F.3d 674, 681 (CA4 2005);

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[9] Many of these courts have also held that, as an affirmative defense, non-exhaustion is waivable if not timely raised. *See, e.g., Johnson v. Testman*, 380 F.3d 691, 695-96 (CA2 2004) (finding waiver); *Smith v. Mensinger*, 293 F.3d 641, 647 n.3 (CA3 2002) (same); *Randolph v. Rodgers*, 253 F.3d 342, 348 n.11 (CA8 2001) (same).

[10] *Jenkins*' statement that non-exhaustion is an affirmative defense appears to be *dicta*. Since *Jenkins* was decided, however, the Second Circuit has repeatedly referred to non-exhaustion as an affirmative defense. *See, e.g., Testman*, 380 F.3d at 695 (following *Jenkins*); *Hemphill v. New York*, 380 F.3d 680, 686 (CA2 2004) (same). Accordingly, the Second Circuit is unquestionably in accord with the majority rule.

Massey v. Helman, 196 F.3d 727, 735 (CA7 2000), *cert. denied*, 532 U.S. 1065 (2001); *Foulk v.Charrier*, 262 F.3d 687, 697 (CA8 2001); *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (CA9), *cert. denied sub nom. Alameida v. Wyatt*, 540 U.S. 810 (2003).[11]

Some of these courts have reasoned that, because Congress drafted the PLRA's exhaustion requirement, 42 U.S.C. § 1997e(a), in the same statutory section as – indeed, just a few printed lines before – the subsection listing grounds on which a district court may *sua sponte* dismiss a prisoner's action, *id.* at § 1997e(c)(1), but *did not* include failure to exhaust among those grounds, Congress did not intend to impose a heightened pleading requirement on PLRA plaintiffs. *See, e.g., Anderson*, 407 F.3d at 680; *Ray*, 285 F.3d at 296 n.10. These courts have also found that Congress' decision to allow district courts to dismiss *sua sponte* a prisoner's complaint "without first requiring the exhaustion of administrative remedies" further supports this interpretation of Congress' intent. *E.g., Anderson*, 407 F.3d at 680-81; *see also, e.g., Ray*, 285 F.3d at 296 n.9. Others have looked to the pleading requirements specified by the Federal Rules of Civil Procedure and this Court's discussions of them. According to these courts, "'Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions,'" *e.g., Wyatt*, 315 F.3d at 1118 (quoting *Swierkiewicz*, 534 U.S. at 513), one of which exhaustion under the PLRA is not, *see, e.g., id.* at 1118-19; *Ray*, 285 F.3d at 297. And yet others have resorted to "considerations of policy [and] fairness," inasmuch as "it is considerably easier for a prison administrator to show failure to exhaust than it is for a prisoner to demonstrate exhaustion." *E.g., Ray*, 285 F.3d at 295 (quoting 5 Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 1271, at 444 (Supp. 2001)).

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[11] The D.C. Circuit has suggested but not directly held that non-exhaustion is an affirmative defense. *See Jackson v. District of Columbia*, 254 F.2d 262, 267 (CADC 2001).

As the preceding discussion shows, there can be no doubt that the federal courts of appeals are irreconcilably split over whether satisfaction of the PLRA's exhaustion requirement is a prerequisite to a prisoner's lawsuit such that the prisoner must allege in his complaint how he exhausted his administrative remedies (or attach proof of exhaustion to the complaint), or instead, whether non-exhaustion is an affirmative defense that must be pleaded and proven by the defense. Only this Court can resolve this entrenched circuit split.

Moreover, this case presents an ideal vehicle for deciding this important and divisive question because the issue was conclusively and dispositively applied by the Sixth Circuit in its decision below and because the split among the circuits has widened since this Court was last presented with a viable vehicle for deciding the issue.

There is no doubt that, had petitioner's case been adjudicated in the circuits embracing non-exhaustion as an affirmative defense, three of petitioner's claims would have been allowed to go forward. In these circuits, respondents would not have been able to plead non-exhaustion as a defense to the entirety of petitioner's complaint because, as respondents conceded in the district court, petitioner exhausted at least one of his claims – his First Amendment retaliation claim against Opanesenko. *See* Pet. App. 32a. Accordingly, respondents would have been limited to pleading non-exhaustion as an affirmative defense to only petitioner's six deliberate indifference claims. Crucially, however, none of the courts below found that these six claims were unexhausted.[12] Rather, the district court dismissed petitioner's deliberate indifference

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[12] For this reason, in the absence of a heightened pleading requirement, the "total exhaustion" rule applied by the Sixth Circuit below as an alternative justification for affirming the district court's dismissal of petitioner's complaint would be inapplicable. That is, the "total exhaustion" rule applied by the Sixth Circuit was only a viable alternative justification for

(continued...)

claims against Bock, Chaplin, Konkle, and Aldabaugh on the merits without inquiring whether the claims were exhausted, *see id.* at 14a, and the district court dismissed petitioner's deliberate indifference claims against Morrison and Opanasenko, notwithstanding the magistrate's finding that the claims were exhausted, *see id.* at 20a-24a, because of petitioner's failure to comply with the Sixth Circuit's heightened pleading standard, *see id.* at 5a-6a. Thus, in any of the seven circuits embracing non-exhaustion as an affirmative defense, three of petitioner's claims – his retaliation claim against Opanasenko and his deliberate indifference claims against Opanasenko and Morrison – would have been allowed to go forward.

To our knowledge, in the past five years, three petitions have attempted to raise the issue whether non-exhaustion is an affirmative defense, but unlike this case, none of those petitions presented as strong a vehicle for deciding the issue. In *Wyatt*, the question was squarely presented by the Ninth Circuit's decision and debated extensively by the parties at the certiorari stage. *Compare* Petition for Certiorari, *Alameida v. Wyatt*, No. 03-10625, at 6-9, *with* Brief of Respondent in Opposition, *Alameida v. Wyatt*, No. 03-10625, at 6-8. Since this Court denied certiorari in *Wyatt*, however, two additional circuits – the Fourth and the Tenth Circuits – have taken opposite positions on the question presented, thereby widening the split among the circuits. *Compare Anderson*, 407 F.3d at 681 (adopting majority view that non-exhaustion is an affirmative defense), *with Steele*, 355 F.3d at 1210 (adopting the minority view that exhaustion must be pleaded by the plaintiff to survive dismissal).

Two other recent petitions attempted to raise the issue but in neither case was the issue

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[12](...continued)
affirming the district court because the Sixth Circuit applied it in conjunction with its heightened pleading standards.

properly presented. In *Steele*, the petitioner attempted to raise the issue, but as the United States accurately noted in its brief in opposition, the Tenth Circuit's discussion of the issue was *dicta* – not holding – and the United States raised exhaustion as an affirmative defense, thereby mooting any challenge to the issue. *See* Brief for the United States in Opposition, *Steele v. Bureau of Prisons*, No. 03-10625, at 8 ("[T]he court of appeals' statement about which party bears the burden of raising exhaustion was not presented by the facts of th[e] case nor was it necessary to its decision. The government specifically raised exhaustion in its initial response to the complaint as an affirmative defense and provided documentation to substantiate the failure to exhaust."). The same is true with respect to *Boyd v. Corrections Corp. of Am.*, 380 F.3d 989 (CA6 2004), *cert. denied sub nom. Allen v. Corrections Corp. of Am.*, 125 S.Ct. 1639 (2005), where "the issue was not raised in the Court of Appeals, nor was it raised in the District Court," and the respondents' answer to the complaint "clearly raise[d] the exhaustion requirement" as an affirmative defense. *See* Brief for the Respondent in Opposition, *Allen v. Corr. Corp. of Am.*, No.04-784, at 7-8.

Unlike the *Steele*, and *Allen* petitions, this petition comes to this Court with this important issue squarely presented. Since the *Wyatt* petition was filed and denied, the issue has further percolated among the courts of appeals, such that ten of the thirteen circuits have now taken positions on the issue and aligned themselves in a 3-7 split. By granting this petition, this Court can bring needed uniformity to this important procedural issue that affects *every one of the over-20,000 PLRA* suits filed each year.

B. The Federal Courts of Appeals Are Intractably and Increasingly Split Over Whether the PLRA Prescribes a "Total Exhaustion" Rule that Requires Federal Courts to Dismiss a PLRA Plaintiff's Complaint for Failure to Exhaust Administrative Remedies Whenever There Is a Single Unexhausted Claim, Despite the Presence of Other Exhausted Claims

This petition also provides this Court an opportunity to resolve whether the PLRA prescribes a "total exhaustion" rule that requires federal courts to dismiss a PLRA plaintiff's complaint for failure to exhaust administrative remedies whenever there is a single unexhausted claim, despite the presence of other exhausted claims – another issue over which the federal courts of appeals are intractably and increasingly divided. The seven federal courts of appeals that have confronted mixed complaints – containing both exhausted and unexhausted claims – have responded in three ways. Three courts of appeals have adopted a strict total exhaustion requirement. Another has adopted a total exhaustion requirement but allows PLRA plaintiffs to amend their complaints to remove unexhausted claims. Finally, three more practice "partial exhaustion" by dismissing only those claims that are unexhausted. The district courts in circuits which have not yet taken a position are similarly divided. This confusion throughout the federal judiciary, as the State of Michigan itself conceded just last Term, requires this Court's intervention. *See* Brief of the States of California et al. as *Amici Curiae*, *McBride v. Ortiz*, No. 04-668 [hereinafter *Ortiz Amici* Br.], at 3-6.

Three courts of appeals – the Third, Sixth, and Tenth Circuits– have adopted a strict total exhaustion requirement by dismissing the entirety of a PLRA plaintiff's complaint if it contains even one unexhausted claim or party. As already outlined *supra*, the "total exhaustion" rule applied by the Sixth Circuit in this case "applies such that a 'mixed' complaint, alleging both exhausted and unexhausted claims, must be completely dismissed for failure to exhaust

administrative remedies." *Jones Bey*, 407 F.3d at 805; *see also id.* at 806 ("We now * * * hold[] that total exhaustion is required under the PLRA."). In reaching this conclusion, the Sixth Circuit agreed with the Tenth Circuit's decision in *Ross*, *see id.* at 806, 807, which held that "the presence of unexhausted claims in [a PLRA plaintiff's] complaint required the district court to dismiss his action in its entirety," *Ross*, 365 F.3d at 1189. The Third Circuit recently reached the same conclusion. *See Vazquez v. Ragonese*, No. 05-1203, 2005 WL 1842273, *1 (CA3 Aug. 4, 2005) (affirming district court's dismissal of prisoner's civil rights complaint where prisoner "exhausted his administrative remedies only with respect to his allegations of retaliation * * * [but] failed to exhaust his available administrative remedies with respect to all other claims"); *see also Rivera v. Whitman*, 161 F. Supp. 2d 337, 343 (D.N.J. 2001) (embracing total exhaustion rule); *but see also Boyd v. Pugh*, No. Civ. 3:CV-04-1761, 2005 WL 1430087, *3 n.1 (M.D. Pa. June 17, 2005) (rejecting total exhaustion rule).

The Third Circuit's position on the issue is devoid of reasoning, *see Vazquez*, 2005 WL 1842273, at *1, but the Sixth and Tenth Circuits have reasoned that both the PLRA's text and various policy considerations mandate their total exhaustion rule. According to these courts, because the exhaustion provision states that no "action" shall be brought in federal court until administrative remedies have been exhausted, 42 U.S.C. § 1997e(a), but the subsection prescribing rules for dismissal refers to "actions" or "claims," *id.* § 1997e(c)(1) & (2), Congress intended to require prisoners to exhaust administrative remedies on all claims before commencing an action. *See Jones Bey*, 407 F.3d at 807; *see also Ross*, 365 F.3d at 1190. These courts also reasoned that a total exhaustion rule furthers Congress' stated policy behind the PLRA of "reduc[ing] the sheer number of prisoner suits, especially frivolous ones." *Jones Bey*,

407 F.3d at 807; *see also Ross*, 365 F.3d at 1190. Finally, these courts analogized their total exhaustion rules to the total exhaustion rule adopted by this Court in the habeas context and reasoned that the comity concerns present in the habeas context are equally present in the prison conditions context. *See Jones Bey*, 407 F.3d at 807-08 (citing *Preiser v. Rodriguez*, 411 U.S. 475, 492 (1973)); *see also Ross*, 365 F.3d at 1189-90.

In contrast, the Eight Circuit has applied the total exhaustion rule but has done so with flexibility that prevents undue prejudice to prisoners. In *Graves v. Norris*, 218 F.3d 884 (CA8 2000), a short *per curiam* opinion, the Eighth Circuit held that "[w]hen multiple prison condition claims have been joined * * * § 1997e(a) requires that all available prison grievance remedies must be exhausted as to all of the claims." *Id.* at 885. Subsequently, however, the Eight Circuit modified its total exhaustion rule in *Kozohorsky v. Harman*, 332 F.3d 1141 (CA8 2003). There, the court held that district courts within the Eighth Circuit must allow PLRA plaintiffs to cure defects in their complaints that run afoul of the total exhaustion rule by amending their complaints to delete any unexhausted claims. *See id.* at 1144 (holding that "the District Court abused its discretion" by denying the plaintiff's "request to amend his complaint * * * dismiss [the unexhausted defendant and] cure[] the defect necessitating dismissal"). Like the Sixth and Tenth Circuits, *See Jones Bey*, 407 F.3d at 807-08; *see also Ross*, 365 F.3d at 1189-90, the Eighth Circuit looked to this Court's habeas jurisprudence regarding mixed habeas petitions but concluded that this Court's habeas jurisprudence supports a rule allowing PLRA plaintiffs to amend their complaints to remove unexhausted claims, *see Kozohorsky*, 332 F.3d at 1144 (discussing *Rose v. Lundy*, 455 U.S. 509, 510, 512 (1982)).

Yet three other courts – the Second, Fifth, and Seventh Circuits – have either expressly

adopted, or implicitly adopted through practice, a partial exhaustion rule, under which unexhausted claims shall be dismissed and exhausted claims shall go forward. In *Ortiz v. McBride*, 380 F.3d 649 (CA2 2004), *cert. denied*, 125 S.Ct. 1398 (2005),[13] the Second Circuit expressly rejected the Tenth Circuit's decision in *Ross*, concluding that the factors discussed by the Tenth Circuit weighed in favor of a partial – rather than a total – exhaustion rule. *See id.* at 656-63. In particular, the Second Circuit found significant that non-exhaustion is not listed among the grounds on which a district court may dismiss a PLRA plaintiff's "action" or "claims" under § 1997e(c). *See id.* at 657. The Second Circuit also reasoned that, contrary to *Ross*'s analysis, a total exhaustion rule would invite piecemeal litigation, thereby increasing the number of PLRA suits and frustrating Congress' stated intent to reduce such suits. *See id.* at 658-59.

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[13] Although the second question presented in this petition was squarely presented and debated extensively by the parties and *amici* at the certiorari stage in *Ortiz*, this case is a preferable vehicle for deciding the issue. *Compare* Petition for Certiorari, *McBride v. Ortiz*, No. 04-668, at 6-18, *and Ortiz Amici* Br. at 3-9, *with* Brief for the Respondent in Opposition, *McBride v. Ortiz*, No. 04-668 [hereinafter *Ortiz* BIO], at 4-16. First, since this Court denied certiorari in *Ortiz*, two additional circuits – the Third and the Sixth Circuits – have taken positions on the issue, thereby widening the split among the circuits. *See Vazquez v. Ragonese*, 2005 WL 1842273, at *1; *Jones Bey*, 407 F.3d at 806. Second, the *Ortiz* petitioners had repeatedly conceded in the proceedings below that, on the facts of that case, application of the total exhaustion rule was unnecessary. *See Ortiz* BIO at 8.

Finally, the *Ortiz* petition sought interlocutory review of the Second Circuit's decision dismissing the respondent's one unexhausted claim and allowing his remaining exhausted claim to go forward. *See Ortiz*, 380 F.3d at 656, 663; *see also Ortiz* BIO at 7. Accordingly, by the time the case came before this Court at the certiorari stage, the petitioner's complaint was "no longer a 'mixed complaint,'" and the petitioner's unexhausted claim was "out of the case and incapable of being reinstated." This posture made *Ortiz* an imperfect vehicle – in stark contrast to the instant petition – for this Court's review. *See Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (interlocutory status of the case "of itself alone furnishe[s] sufficient ground for the denial" of the petition); *see also Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting denial of certiorari); *see also* Robert L. Stern et al., SUPREME COURT PRACTICE § 4.18, at 258 n.59 (8th ed. 2002) (noting that this Court routinely denies petitions challenging interlocutory determinations that have been mooted or may be mooted by the conclusion of the lower courts' proceedings).

Finally, the Second Circuit found that *Ross*'s "heavy reliance on * * * habeas 'total exhaustion' principles [wa]s misplaced" because prison grievance systems are distinct in a number of significant ways from state courts adjudicating criminal appeals and collateral attacks on an underlying conviction. *Id.* at 660-62.

The Seventh Circuit has not addressed the total exhaustion issue directly but has practiced partial exhaustion by dismissing only unexhausted claims when a mixed complaint has been filed. *See Lewis v. Washington*, 300 F.3d 829, 836 (CA7 2003) (affirming dismissal of one claim for failure to exhaust but remanding for determination of whether other claim was exhausted); *Dixon v. Page*, 291 F.3d 485, 489-90 (CA7 2002) (affirming partial dismissal for failure to exhaust); *see also Henderson v. Sebastian*, No. 04-C-0039-C, 2004 WL 1946398, *5 (W.D. Wis. Aug. 25, 2004) ("I view the [Seventh Circuit's] tacit rejection of a total exhaustion requirement in § 1983 actions as consistent with the Second Circuit's holding [in *Ortiz*]. I believe that partial dismissal is the proper course to take addressing a suit containing both exhausted and unexhausted claims."). The Fifth Circuit has also practiced partial exhaustion by dismissing only unexhausted claims from a mixed PLRA complaint. *See Johnson*, 385 F.3d at 533.

In the three circuits in which the issue has been addressed at only the district court level – the First, Fourth, and Ninth Circuits – the district courts' decisions reveal similar divisions. The District of Maine, to our knowledge the only district court within the First Circuit to confront the issue, has embraced the total exhaustion rule. *See Donovan v. Magnusson*, No. Civ. 03-226-B-W, 2004 WL 1572598, *2 (D. Me. June 7, 2004). The two district courts within the Fourth Circuit that, to our knowledge, have confronted the issue are split. *Compare Johnson v. True*, 125 F. Supp. 2d 186, 188 (W.D. Va. 2000) (rejecting total exhaustion rule), *with*

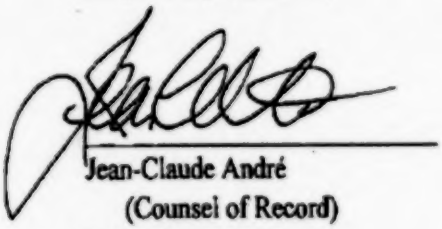
Cummings v. Rubenstein, No. Civ. A. 5:03-2195, 2004 WL 3312062, *9 (S.D.W. Va. Sep. 30, 2004) (embracing total exhaustion rule). Finally, the dozens of district courts within the Ninth Circuit that have confronted the issue are similarly split. *Compare, e.g., Ramirez v. Bray*, No. C 04-3769 MMC (PR), 2005 WL 2249900, *1-*2 (N.D. Cal. Sep. 15, 2005) (applying "total exhaustion" rule); *Smith v. Villanueva*, No. CV04-1211-MO, 2005 WL 2105013, *1 (D. Or. Aug. 22, 2005) (same); *Ornelas v. Giurbino*, 358 F. Supp. 2d 955, 962 (S.D. Cal. 2005) (same); *Thorp v. Kepoo*, 100 F. Supp. 2d 1258, 1263 (D. Haw. 2000) (same), *with Singleton v. Morales*, No. CV F 035557RECLJOP, 2005 WL 2064145, *3 (E.D. Cal. Aug. 25, 2005) (rejecting "total exhaustion" rule); *Clark v. Mason*, No. C04-1647C, 2005 WL 1189577, *9 (W.D. Wash. May 19, 2005) (same); *Blackmon v. Crawford*, 305 F. Supp. 2d 1174, 1179 (D. Nev. 2004) (same); *Lozeau v. Lake County, Montana*, 98 F. Supp. 2d 1157, 1167 (D. Mont. 2000) (same); *Cooper v. Garcia*, 55 F. Supp. 2d 1090, 1095 (S.D. Cal. 1999) (same).

As with the first question presented in this petition, it is clear that, were this case decided in a circuit without a heightened pleading requirement and without a total exhaustion rule, petitioner's three exhausted claims would go forward. Surely, a PLRA plaintiff's ability to test the merits of his exhausted claims should not turn on such geographic whims. Without a definitive ruling from this Court, the PLRA's exhaustion requirement will continue to be applied inconsistently in the courts across the country.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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October 13, 2005

APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
File Name: 05a0506n.06
Filed: June 15, 2005

No. 03-2576

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LORENZO L. JONES,	)	
	)	ON APPEAL FROM THE
Plaintiff-Appellant,	)	UNITED STATES DISTRICT
	)	COURT FOR THE EASTERN
v.	)	DISTRICT OF MICHIGAN
	)	
BARBARA BOCK, Warden, et al.,	)	**OPINION**
	)	
Defendants-Appellees.	)	

BEFORE: BATCHELDER and COLE, Circuit Judges; REEVES, District Judge*

PER CURIAM. Plaintiff-Appellant Lorenzo Jones appeals a district court order dismissing his action brought pursuant to 42 U.S.C. § 1983 for violations of the First, Eighth, and Fourteenth Amendments of the United States Constitution. For the reasons that follow, we **AFFIRM** the judgment of the district court.

I. BACKGROUND

On November 14, 2000, Plaintiff-Appellant Lorenzo Jones sustained serious injuries from a motor vehicle accident while he was in custody of the Michigan Department of Corrections. Jones alleges that after the accident, various prison officials required him to complete tasks which aggravated his injuries. He argues, *inter alia*, that this action constituted deliberate indifference to

*The Honorable Danny C. Reeves, United States District Judge for the Eastern District of Kentucky, sitting by designation.

his serious medical needs in violation of the Eighth Amendment of the United States Constitution. The defendants sought dismissal of the complaint based on Jones's failure to exhaust administrative remedies as required by the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (1996) ("PLRA"), codified at various sections of 28 and 42 U.S.C. The district court granted the motion. This appeal followed.

II. ANALYSIS

The district court did not err in dismissing the claims against the prison officials based on Jones's failure to exhaust his administrative remedies. The PLRA requires plaintiffs to exhaust all administrative remedies before bringing an action in federal court regarding prison conditions. 42 U.S.C. § 1997e(a). This Circuit follows the "total exhaustion" rule, meaning that we must dismiss a complaint for failure to exhaust administrative remedies whenever there is a single unexhausted claim, despite the presence of other exhausted claims. *See Bey v. Johnson*, 407 F.3d 801, 806 (6th Cir. 2005) ("We now join the Tenth and Eighth Circuits in holding that total exhaustion is required under the PLRA."). An action is one regarding prison conditions where it arises under federal law and concerns, *inter alia*, the "effects of actions by government officials on the lives of persons confined in prison." 18 U.S.C. § 3626(g)(2).

This Court has held that in order to meet the exhaustion requirement of the PLRA, a prisoner must either attach a copy of his prison grievance forms to the complaint or state the nature of the remedies pursued and the result of each process. *See Knuckles-El v. Toombs*, 215 F.3d 640, 642 (6th Cir. 2000). Jones stated in his complaint that he had exhausted his administrative remedies. However, he neither attached the grievance forms to his complaint nor described the remedies he

pursued and the outcome. The fact that the defendant later provided evidence that Jones may have exhausted some of his claims is irrelevant under the PLRA and Sixth Circuit precedent. *See Baxter v. Rose*, 305 F.3d 486, 488-90 (6th Cir. 2002). Furthermore, even if Jones had shown he had exhausted some of his claims, the district court properly dismissed the complaint because Jones did not show that he had exhausted all of his claims. *See Bey*, 407 F.3d at 806. Accordingly, Jones's prison-conditions claim was properly dismissed as he did not comply with the exhaustion requirement, as defined by this Court's precedent.

III. CONCLUSION

For the preceding reasons, we **AFFIRM** the judgment of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CLOSED

03 SEP 25 P 4:48

ORIGINAL

LORENZO JONES,

Plaintiff,

vs

WARDEN BOCK, ET AL

Defendants.

_____/

U.S. DIST. COURT CLERK
EAST DIST. MICH.
DETROIT

Case No: 02-74336
Honorable Victoria A. Roberts

ORDER ADOPTING REPORT AND RECOMMENDATION, IN PART

I. Introduction

This matter is before the Court on Defendants' 12(b)(6) Motion to Dismiss [**Doc. 15**]. Plaintiff, proceeding *pro se*, is a prison inmate whose complaint alleges that as a result of Defendants' indifference to his condition, he was forced into a physical assignment which aggravated previous injuries. Defendants move to dismiss for failure to comply with the exhaustion requirement of the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(a). Plaintiff responded. Magistrate Judge Steven Pepe issued a Report and Recommendation recommending that certain of the Defendants--Bock, Chaplin, Konkle and Aldabaugh--should be dismissed for failure to state a claim. The Magistrate Judge recommended, however, that the claims against Defendants Morrison and Opanesenko should not be dismissed, finding that Plaintiff had exhausted constitutional claims. Both Plaintiff, and Opanesenko and Morrison, filed objections.

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II. FACTUAL BACKGROUND

The Court has conducted a *de novo* review of the pleadings and papers filed. The Court accepts the Magistrate's recommendation with respect to Bock, Chaplin, Konkle and Aldabaugh. However, the Court overrules the Magistrate's finding concerning Morrison and Opanesenko.

In order to effectuate the exhaustion requirement of 42 U.S.C. § 1997e(a), the PLRA, a prisoner must plead his claims with specificity and show that they have been exhausted, by attaching a copy of the applicable dispositions to the complaint, or, in the absence of any documentation, describe with specificity the administrative proceeding and its outcome. *Knuckles-El v Toombs*, 215 F.3d 640, 642 (6th Cir. 2000). Failure to demonstrate exhaustion with the complaint can result in dismissal for failure to state a claim. *Baxter v. Rose*, 305 F. 3d 486, 489 (6th Cir. 2002). Moreover, grievances filed in an attempt to exhaust administrative remedies must name the individual subjects of the grievance so prison officials can address the claims before a suit is filed in federal court. *Curry v Scott*, 249 F.3d 493, 505 (6th Cir. 2001).

In his Complaint, Plaintiff states that he filed the necessary grievances, providing dates on which such grievances were filed, but he only states that the grievances "cit[ed] each instant in which [sic] plaintiff is alleging in this complaint." Compl. at 2. Plaintiff does not explain the specific issues raised by the grievance or why the grievance and its appeals were denied. This explanation is required, so that the Court can make a finding concerning the exhaustion requirement.

That Plaintiff attached the Step I grievance and the Step II and III appeals to his

responses to the motion to dismiss, does not satisfy the exhaustion requirement. The *Baxter* court held that a prisoner cannot satisfy the exhaustion requirement by amending his complaint. *Baxter v Rose*, 305 F. 3d at 489. Further, the documentation regarding grievances supplied by the Defendants as part of their motion to dismiss does not cure Plaintiff's failure to properly plead exhaustion. The burden of production and proof is on the prisoner. And, the PLRA establishes a unique procedure under which the court, not the parties, is required to evaluate whether a claim on which relief can be granted has been set forth in the complaint. "Courts would be unable to screen cases effectively if plaintiffs were able, through, ambiguous pleading, to avoid dismissal of claims on which relief could not be granted." *Baxter*, 305 F. 3d at 490.

Based on the foregoing, the Court finds that Plaintiff's claim against these two Defendants must be dismissed as well, for Plaintiff's failure to state a claim upon which relief can be granted. The Court need not reach Defendants' argument that Plaintiff's Complaint must be dismissed for his failure to totally exhaust all claims. Judgment is to enter against Plaintiff in favor of all Defendants.

IT IS SO ORDERED.

Victoria A. Roberts
Victoria A. Roberts
United States District Judge

Dated: SEP 25 2003

APPENDIX C

ORIGINAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LORENZO L. JONES, #176204

Plaintiff,

Case No. 02-74336

vs.

HONORABLE VICTORIA A. ROBERTS
HONORABLE STEVEN D. PEPE

STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF CORRECTIONS, B. BOCK, V. CHAPLIN, P. MORRISON, OFFICER OPANASENKO, JANET KONKLE, AND AHMED ALDABAUGH,

Defendants.
_____/

FILED
Jun 30 11 26 AM '03
U.S. DISTRICT COURT

REPORT AND RECOMMENDATION

Lorenzo Jones ("Plaintiff") is a prisoner in the custody of the Michigan Department of Corrections ("MDOC"). On November 15, 2002, he filed a complaint against the above named defendants pursuant to 42 U.S.C. § 1983, alleging violations of his rights under the First, Fourth, and Fourteenth Amendments. Plaintiff is proceeding *in forma pauperis*. Defendants have filed a motion to dismiss and a motion to stay discovery, both of which were referred for hearing and determination pursuant to 28 U.S.C. § 636(b)(1)(A).[1] For the following reasons, defendants' motion to dismiss should be GRANTED IN PART. Plaintiff's claims against Defendants Bock, Chaplin, Konkle, and Aldabaugh should be DISMISSED for

[1] Because Defendants' motion to dismiss is a dispositive motion, the undersigned Magistrate Judge may issue only a Report and Recommendation, not a final determination, on that motion. 28 U.S.C. § 636(b)(1)(A).

failure to state a claim; however, Plaintiff has exhausted federal constitutional claims with respect to Defendants Morrison and Opanasenko and, thus, these claims should not be dismissed at this time.

I. FACTUAL AND PROCEDURAL BACKGROUND

On November 14, 2000, Plaintiff was involved in a motor vehicle accident while in the custody of MDOC, which resulted in significant injury. Plaintiff alleges that he suffered a C5-6 fracture dislocation with myelopathy which required fusion surgery. He also suffered a hematoma to the spinal cord, hairline fracture to his left arm, abrasions on his scalp, lower back injuries, upper and lower extremity weakness on the left side, and numbness below his neck.

On or around July 19, 2001, Defendant Morrison, who determines the work assignments of prisoners at the facility in which Plaintiff is incarcerated, assigned Plaintiff to a position as the "Big Yard Equipment Handler," which involves lifting, standing, bending, stooping, and passing out equipment such as the baseball equipment bag, horseshoes, and basketballs. Plaintiff claims that he notified Morrison of his injuries, but that the assignment was not changed. Plaintiff reported to this assignment on or around July 23, 2001, and informed the staff member in charge, Defendant Opanasenko, that he could not perform the duties required because of his injuries. Plaintiff wore a neck brace and a left leg brace and walked with a cane. Allegedly, Opanasenko stated that Plaintiff was faking his injuries and told Plaintiff that he could either perform his work assignment "or suffer the consequences." Plaintiff claims that he chose to work in order to avoid receiving a major misconduct ticket; as

a result, he aggravated his injuries. Plaintiff also claims that Opanasenko harassed him by threatening to place Plaintiff in segregation if he did not perform his job and by telling a superior officer that Plaintiff was staring at him in a threatening manner. Plaintiff finally asserts a retaliation claim by stating that Defendant Opanasenko issued a false work evaluation. Essentially, Plaintiff is alleging First Amendment retaliation and Eighth Amendment deliberate indifference claims against Opanasenko and a deliberate indifference claim against Morrison.

Plaintiff also asserts that Defendants Chaplin, a deputy warden who apparently is in charge of approving work assignments; Warden Barbara Bock; Konkle, a registered nurse; and Aldabaugh, a physician,[2] either knew or should have known of Plaintiff's alleged inability to work and should have rectified the situation. He asserts that Defendant Chaplin violated the First, Eighth, and Fourteenth Amendments and that Bock, Konkle, and Aldabaugh violated the Eighth Amendment through their deliberate indifference to his medical needs. Finally, Plaintiff alleges a claim of respondeat superior against MDOC. On November 19, 2002, District Judge Victoria Roberts dismissed Plaintiff's claims against MDOC and the State of Michigan because those defendants were entitled to immunity under the Eleventh Amendment.

On February 13, 2003, Defendants Bock, Chaplin, Morrison, and Opanasenko filed a Rule 12(b)(6) motion to dismiss for failure to exhaust and a motion to stay discovery. Plaintiff responded to the Rule 12(b)(6) motion on February 21, 2003, and again on March 28, 2003.

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[2] In his complaint, Defendants Konkle and Aldabaugh were named as Jane and John Doe. Plaintiff subsequently filed a motion to add Konkle and Aldabaugh as defendants, which motion was granted on January 17, 2003. These two defendants have not yet been served.

He claims he did comply with the exhaustion requirement by explaining the exhaustion process in his complaint and that Defendants attached evidence of exhaustion to their motion to dismiss.

II. ANALYSIS

A. Rule 12(b)(6)

In deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), a court must accept all well-pleaded allegations as true and construe them in the light most favorable to plaintiff. *Zinermon v. Burch*, 494 U.S. 113, 117 (1990); 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357, at 304 (2d ed. 1990). *See also Jenkins v. McKeithen*, 395 U.S. 411, 421-22 (1969); *Westlake v. Lucas*, 537 F.2d 857 (6th Cir. 1976). A complaint will not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Moreover, *pro se* complaints are to be construed liberally. *Haines v. Kerner*, 404 U.S. 519, 520 (1972). Ordinarily, a court may decide a motion to dismiss only on the basis of the pleadings. *See Song v. City of Elyria, Ohio*, 985 F.2d 840, 842 (6th Cir. 1993). Additionally, the Prison Litigation Reform Act of 1995 ("PLRA") mandates that a court screen a prisoner's complaint and dismiss any claims raised that are frivolous, malicious, or fail to state a claim upon which relief may be granted, 28 U.S.C. § 1915A(b)(1); *McGore v. Wrigglesworth*, 114 F.3d 601, 608 (6th Cir. 1997), and may dismiss any such claim without first requiring exhaustion of administrative remedies. 42 U.S.C. § 1997e(c).

B. Exhaustion of Administrative Remedies

The PLRA, which applies to all claims filed after April 26, 1996, requires a prisoner to exhaust all administrative remedies before bringing a federal suit regarding prison conditions. 42 U.S.C. § 1997e(a). This requirement applies to all § 1983 claims that fall under "the definition of a 'civil action with respect to prison conditions' as set forth in 18 U.S.C.A. § 3626(g)(2)." *Hartsfield v. Vidor*, 199 F.3d 305, 308 (6th Cir. 1999) (footnote omitted) (applying exhaustion requirement to prisoner's equal protection claim). That section provides:

> the term "civil action with respect to prison conditions" means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison. . . .

18 U.S.C.A. § 3626(g)(2).

The exhaustion provision of the PLRA provides in pertinent part, "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). The Supreme Court has held that the exhaustion requirement must be satisfied, so long as some responsive action is available, even if the relief sought is not available. *Booth v. Churner*, 532 U.S. 731, 736-41, 740 n.5 (2001).

The Sixth Circuit has applied the requirements of the PLRA to hold that a prisoner who files a § 1983 claim involving prison conditions must *allege* and *show* that he has exhausted all available state administrative remedies. *Brown v. Toombs*, 139 F.3d 1102, 1104 (6th Cir. 1998). That Court has further stated that when filing a civil complaint regarding prisoner

conditions, "a prisoner must plead his claims with specificity and show that they have been exhausted by attaching a copy of the applicable administrative dispositions to the complaint or, in the absence of written documentation, describe with specificity the administrative proceeding and outcome:" *Knuckles-El v. Toombs*, 215 F.3d 640, 642 (6th Cir. 2000). Failure to demonstrate exhaustion *with the complaint* can result in dismissal for failure to state a claim. *Baxter v. Rose*, 305 F.3d 486, 489 (6th Cir. 2002). Moreover, grievances filed in an attempt to exhaust administrative remedies must name the individual subjects of the grievances so prison officials can address the claims before a suit is brought in federal court. *Curry v. Scott*, 249 F.3d 493, 505 (6th Cir. 2001).

C. Factual Analysis

1. *Defendants Bock, Chaplin, Konkle, and Aldabaugh*

Although Plaintiff alleges First and Fourteenth Amendment[3] claims against Chaplin, he states no facts that would support such claims. Rather, Plaintiff's factual allegations potentially support only claims that these four defendants were deliberately indifferent to his medical needs by failing to remove him from the work detail he claims he could not perform. Yet, he has failed to state a claim upon which relief could be granted with respect to any of these defendants; Plaintiff's claims against these four defendants should be dismissed.

Prison officials may be liable under the Eighth Amendment for deliberate indifference to inmates' health or safety. *Farmer v. Brennan*, 511 U.S. 825, 832-35 (1994). In order to be

[3] Based upon Plaintiff's allegations, which are devoid of any due process or equal protection issues, his Fourteenth Amendment claim can be cited only for the fact that the Fourteenth Amendment applies to protections of the first eight amendments to the Constitution to the states.

held liable, the official must know of and disregard an excessive risk to inmate health or safety. *Id.* at 837. The prisoner must show that the official acted or failed to act despite his knowledge of a substantial risk of serious harm. *Id.* at 841-42. A claim of deliberate indifference requires a showing of more than mere negligence and less than actual intent. *See Sanderfer v. Nichols*, 62 F.3d 151, 154 (6th Cir. 1995) (equating deliberate indifference with "criminal recklessness, which requires a subjective showing that the defendant was aware of the risk of harm."); *Gibson v. Foltz*, 963 F.2d 851, 853 (6th Cir. 1992) ("Obduracy or wantonness, not inadvertence or good faith error, characterizes deliberate indifference."); *Ribble v. Lucky*, 817 F. Supp. 653, 655 (E.D. Mich. 1993) (finding even "gross negligence" by prison officials insufficient to support a claim of deliberate indifference).

Thus, to satisfy this objective component, a plaintiff must allege a deprivation that is "sufficiently serious." "[O]nly those violations denying 'the minimal civilized measure of life's necessities' are sufficiently grave to form the basis of an Eighth Amendment violation." *Wilson v. Seiter*, 501 U.S. 294, 298 (1991) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)). Additionally, the Court has required a showing of "extreme deprivations . . . to make out a conditions-of-confinement claim." *Hudson v. McMillian*, 503 U.S. 1, 9 (1992).

A medical need is "serious" if it has been diagnosed by a physician as requiring treatment or is so obvious that a lay person would easily recognize the necessity for a doctor's attention. *Monmouth County Correctional Inst. Inmates v. Lanzaro*, 834 F.2d 326, 347 (3d Cir. 1987), *cert. denied*, 486 U.S. 1006 (1988). A serious ailment requires immediate attention or is potentially life-threatening: "[a] 'serious' medical need exists if the failure to treat a prisoner's condition could result in further significant injury or the 'unnecessary and

wanton infliction of pain.'" *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992) (citation omitted), *overruled on other grounds by WMX Techs., Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997). *Farmer* explains further that in order to demonstrate the subjective element of deliberate indifference, "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. . . ." 511 U.S. at 836-37. This subjective element may be proven, however, when circumstantial evidence shows that the risk of harm was so obvious that an official must have known of its existence. *Ewolski v. City of Brunswick*, 287 F.3d 492, 513 n.7 (6th Cir. 2002) (citing *Farmer*, 511 U.S. at 842).

Here, Plaintiff makes no assertions that any of these defendants had any direct role in the job assignment, and makes only conclusory allegations that any of these defendants knew of a serious risk of harm to Plaintiff or actually drew such an inference. Without more detail, such conclusory assertions cannot be the basis of a § 1983 claim. *See Ana Leon T. v. Federal Reserve Bank*, 823 F.3d 928, 930 (6th Cir. 1987); *Chapman v. City of Detroit*, 808 F.2d 459, 465 (6th Cir. 1986).

He claims that Defendant Chaplin must agree to all work assignments, but makes no assertion that Chaplin actually knew of facts from which he could infer the existence of a substantial risk of harm, nor does he provide concrete assertions that Chaplin actually drew such an inference. The same is true of his assertions against Defendant Bock. With regard to nurse Konkle and Dr. Aldabaugh, Plaintiff states only that they had the duty to inform other MDOC officials that he could not perform the duties of the equipment handler. Even if such a duty exists, and even if the failure to inform other MDOC staff members of the extent of

Plaintiff's impairments was negligent, he has not alleged that these two health care workers actually drew the inference that a serious risk of harm existed. Medical malpractice, without more, does not constitute an Eight Amendment violation.

Rather, he seems to assume that because he wore neck and leg braces and used a cane, these defendants should have determined that he could not perform his job because the risk of harm was obvious. Even assuming that all four of these defendants had knowledge of Plaintiff's condition, he makes only conclusory and unsupported assertions that his condition was sufficiently serious for the defendants' inaction to rise to the level of deliberate indifference. The fact that Plaintiff continued to suffer from his injuries does not necessarily mean he could not perform the job at issue. It is of note that of the medical records Plaintiff attached to his response to the motion to dismiss to support his claim that he could not work, the only document that sheds any light on his ability to work is a form completed by a physician noting that Plaintiff was unable to perform certain work between November 14, 2000 - the date of his injury - and March 12, 2001 - four months prior to the time he was assigned to the Big Yard Equipment Handler position. Considering Plaintiff's allegations in the light most favorable to him, it cannot be said that Plaintiff adequately alleged that these four defendants either knew of a serious risk of harm or drew such an inference. As such, Plaintiff cannot state a cognizable deliberate indifference claim against Defendants Bock, Chaplin, Konkle, and Aldabaugh, and these claims should be dismissed.

2. *Defendants Opanasenko and Morrison*

Plaintiff alleges that Defendants Morrison and Opanasenko were deliberately indifferent to his medical needs and that Opanasenko retaliated against him in violation of the First

Amendment. Based solely upon the allegations in his complaint viewed in the light most favorable to Plaintiff, he appears to have asserted cognizable constitutional claims in this regard. Thus, whether Plaintiff met the exhaustion requirement is a necessary consideration. In his responses to defendants' motion to dismiss, Plaintiff asserts both that he adequately described the exhaustion procedures in his complaint as permitted by *Knuckles-El* and that he submitted proper documentation of exhaustion in those responses. Although Plaintiff does state in his complaint that he filed the necessary grievances, providing the dates on which such grievances were filed, he only states that the grievances "cit[ed] each instant in which [sic] Plaintiff is alleging in this complaint." Compl. at 2. Yet, he does not explain the specific issues raised by the grievance or why the grievance and its appeals were denied. Without such explanation, this Court cannot make a finding that he described the process with the needed specificity.

Moreover, although Plaintiff attached the Step I grievance and the Step II and III appeals to his responses to the motion to dismiss, such conduct does not satisfy the exhaustion requirement. A prisoner may not amend a complaint to satisfy the exhaustion requirement when he has not complied with that requirement in the first instance. *Baxter*, 305 F.3d at 489. *Baxter* has been cited by at least one unpublished case to hold that *sua sponte* dismissal for failure to exhaust was proper even where a plaintiff submitted evidence of exhaustion after he had filed his complaint. *Zeigler v. Michigan*, 2003 U.S. App. LEXIS 2239 (6th Cir. Feb. 6, 2003) (unpublished). Thus, these arguments do not preclude dismissal.

Yet, Plaintiff also notes that in the motion to dismiss, *defendants* provided the documentation necessary to establish exhaustion and thus, dismissal of his claims is not

appropriate. This issue has not explicitly been addressed by this or any other circuit. Defendants do, in fact, attach documentation that indicates Plaintiff filed a Step I grievance which he appealed through Step III.[4]

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[4] Defendants attach this documentation in an effort to show that Plaintiff failed to exhaust *all* of his claims, arguing that his failure to exhaust even one claim raised in the lawsuit requires dismissal of the entire complaint. Defendants' argument in this regard in unavailing. In support of this claim, defendants cite *Smith v. Federal Bureau of Prisons*, 300 F.3d 721 (6th Cir. 2002); *Linder v. Sundquist*, 2002 U.S. App. LEXIS 19662 (6th Cir. Sept. 18, 2002) (unpublished); and *Kemp v. Jones*, 2002 U.S. App. LEXIS 16058 (6th Cir. Aug. 6, 2002) (unpublished).

Both *Smith* and *Linder* dismissed the plaintiffs' claims for failure to exhaust; however, in both cases, the plaintiff had not exhausted *any* claims. *Smith*, *supra*, at 723; *Linder*, *supra*, at *4. In *Kemp*, the court did dismiss all of the plaintiff's claims despite the fact that some of those claims were exhausted. *Kemp*, *supra*, at *3-*4. The court cited *Mack v. DeWitt*, 2002 U.S. App. LEXIS 8609 (6th Cir. Apr. 30, 2002) (unpublished), to support this finding. *Id.* In *Mack*, however, the plaintiff's claims were dismissed because, as in *Smith* and *Linder*, the plaintiff did not attach any documentation to support a finding that he exhausted his administrative remedies for *any* of his claims. *Mack*, *supra*, at *4-*5. Because *Kemp* is not based on any authority that supports its ultimate holding, this Court should not follow *Kemp*.

Smeltzer v. Hook, 235 F. Supp. 2d 736, 2002 U.S. Dist. LEXIS 17686 (W.D. Mich. 2002), and *Keenan v. Twommey*, 2000 U.S. App. LEXIS 21200 (6th Cir. Aug. 10, 2000) (unpublished) (simply affirming, but not discussing, a district court ruling with the same reasoning as *Smeltzer*), neither of which are cited by defendants, provide some support for defendants' claim. *Smeltzer*, preferring "total exhaustion" over "claim exhaustion," focuses on the language of § 1997e(a), which requires exhaustion to be complete before a prisoner can bring an "action," and decides that failure to exhaust even one claim requires dismissal of the entire "action" rather than just that claim. *Smeltzer*, *supra*, at *20-21. *Smeltzer* also discusses policy arguments for requiring total exhaustion such as conservation of judicial resources, discouraging prisoners from raising unexhausted claims, and a similar requirement in habeas cases. *Id* at *23-25.

While *Smeltzer* distinguishes between dismissing "actions" and "claims," it is not clear that the different language indicates that Congress intended to require dismissal of an entire case when a prisoner fails to exhaust even one claim. Section 1997e(a) states that a prisoner may not bring an action without first exhausting available administrative remedies. Yet, once any unexhausted claims are dismissed, the action only involves exhausted claims, and even under defendants' theory, § 1997e(a) will be satisfied.

Additionally, the policy arguments set forth in *Smeltzer* are not convincing. The PLRA already provides significant motivation to exhaust. Although many prisoners fail to do so, many others have realized the effect of § 1997e(a) and at least attempt to carefully comply with the statute. While *Smeltzer* argues that judicial resources will be conserved by following this rule, the likely result is that a prisoner whose exhausted claims are dismissed under "total exhaustion" will simply refile his complaint alleging only the exhausted claims. *See Cooper v. Garcia*, 55 F.Supp. 2d 1090, 1095 (S.D.Cal. 1999); *Jenkins v. Toombs*, 32 F.Supp. 2d 955, 959 (W.D.Mich. 1999). As such, each such lawsuit will actually turn into two lawsuits and, assuming the statute of limitations does not bar refiling, the court will be required to address the issues regardless of "total exhaustion." *Cooper*, 55 F.Supp. 2d at 1094-95. In this case, the limitations period will not run until at least July 2004.

Thus, the first question that must be addressed is whether a complaint must be dismissed for failure to exhaust when a plaintiff does not demonstrate exhaustion with the complaint, but where the *defendant* provides evidence of exhaustion. This is a different situation than involved in *Baxter* and not one a Plaintiff could manipulate to try to avoid a dismissal as in *Baxter*.

Moreover, although *Smeltzer* analogizes to the habeas context in which prisoners are required to completely exhaust state remedies prior to filing suit, in habeas cases a federal court may order a stay of federal proceedings to allow a prisoner to exhaust state remedies – a remedy not generally available in prisoner § 1983 litigation. *See Duncan v. Walker*, 533 U.S. 167, 182-83 (2001) (Stevens, J., concurring) (suggesting that a stay to permit state exhaustion in *habeas* cases is proper); *Palmer v. Carlton*, 276 F.3d 777, 781 (6th Cir. 2002) (adopting Justice Stevens' argument in *Duncan*); *Freeman v. Francis*, 196 F.3d 641 (6th Cir. 1999) (holding that a prisoner's failure to exhaust prior to filing a § 1983 lawsuit requires dismissal); *Wright v. Morris*, 111 F.3d 414 (6th Cir. 1997) (noting that prior to passage of the PLRA, granting a stay in a prisoner's § 1983 lawsuit was permissible when exhaustion was not completed prior to filing, but that exhaustion prior to filing suit is now mandatory).

Recently, the Sixth Circuit has issued an unpublished decision adopting the "total exhaustion" approach. *Shorter v. Campbell*, 2003 U.S. App. LEXIS 3343, *5-*6 (6th Cir. Feb. 20, 2003) (unpublished) (citing *Julian-Bey v. Crowley*, 24 Fed. Appx. 393, 2001 U.S. App. LEXIS 26192 (6th Cir. Dec. 3, 2001) (unpublished order)). Both cases rely on *Brown v. Toombs*, 139 F.3d 1102 (6th Cir. 1998), to support their holdings. *Id.* ("*Brown* makes it explicit that a prisoner must exhaust his administrative remedies before filing his complaint. *Brown* makes no provision for a 'mixed' complaint. There must be exhaustion of every grievance filed." (citations omitted)). Essentially, *Shorter* and *Julian-Bey* reach the conclusion that because *Brown* did not explicitly indicate that "mixed" complaints were permissible it, in fact, rejected such a possibility.

To the contrary, published Sixth Circuit authority has indicated otherwise. *Knuckles-El v. Toombs*, 215 F.3d 640 (6th Cir. 2000), decided subsequent to *Brown*, stated

> [w]e reserve to another day the question of whether exhausted claims in a "mixed" complaint should be addressed when such claims otherwise meet the pleading requirements or whether such a complaint should be dismissed in its entirety. The complaint here does not meet the pleading requirements set forth in *Brown* . . . and it was therefore properly dismissed.

Knuckles-El, 215 F.3d at 642. The court explicitly differentiated between the requirements in *Brown* and the undecided question of whether a prisoner's complaint must be dismissed for failure to exhaust only some of the claims raised. While *Knuckles-El* did leave open the question of whether "total exhaustion" or "claim exhaustion" would be the correct method to adopt, it certainly did not interpret *Brown* as requiring "total exhaustion," and no subsequent published authority has interpreted *Brown* in the manner suggested by *Shorter*.

The primary purpose of the PLRA was to reduce the number of frivolous lawsuits and to provide for more efficient adjudication of non-frivolous suits filed by prisoners. *See, e.g., Porter v. Nussle*, 534 U.S. 516, 524-25 (2002); *Freeman v. Francis*, 196 F.3d 641, 644 (6th Cir. 1999). Protection of agency autonomy and promotion of judicial efficiency have also been cited as motivations behind the exhaustion requirement. *See, e.g., Brown v. Toombs*, 139 F.3d 1102, 1103-04 (6th Cir. 1998); *Wright v. Morris*, 111 F.3d 414, 421 (citing *McCarthy v. Madigan*, 503 U.S. 140 (1992), *superceded by statute on other grounds as noted in Booth v. Churner*, 532 U.S. 731, 739-40 (2001)).

When a defendant admits that certain arguments have been exhausted and/or supplies a court with demonstration of such exhaustion, certain of the above concerns behind the PLRA are either diminished or non-existent. Agency autonomy is no longer in question, as the defendant(s) – in this case, employees of MDOC, the agency at issue – shows that the agency had the opportunity to address certain of the complaints and deal with the issues internally before a lawsuit was filed. Especially when the defendant provides copies of the grievances and appeals filed, concerns of judicial efficiency are diminished because, as noted in *Porter v. Nussle*, "adjudication [can] be facilitated by an administrative record that clarifies the contours of the controversy." 534 U.S. at 525. Such documentation also helps a court begin to determine the relative merit or frivolity to a prisoner lawsuit – at least as much as in situations where the documentation is attached to the original complaint.

Moreover, while *Baxter* appears to require dismissal for the Plaintiff's failure to demonstrate exhaustion with the complaint despite these policy considerations, that case is distinguishable from the present case. In *Baxter*, the district court, holding that a *plaintiff*

cannot amend a complaint to cure a defect in pleading exhaustion, dismissed the plaintiff's complaint *sua sponte* because the prisoner had failed to show in his complaint that he had exhausted his administrative remedies. *Baxter*, 305 F.3d at 488-89. Indeed, in *Baxter*, plaintiff had not even alleged that he had completed the exhaustion requirement against the defendants. Plaintiff in the present case did allege that he had completed exhaustion against the Defendants, and even gave the precise dates on which the grievance and appeals were filed, but failed to attach the necessary documentation. The *defendants* did attach the missing documents evidencing exhaustion to their motion to dismiss prior to Plaintiff's attempt to supplement the record by attaching the same documentation. Defendants' motion was filed on February 13, 2003. This case was not referred to the undersigned until March 18, 2003. Thus, when the undersigned first received this case for consideration, proof of exhaustion was already present in the record through a filing provided by *defendants*. Were this Court to recommend *sua sponte* dismissal as envisioned in *Baxter*, which would often take place before supplemental evidence of exhaustion could be provided, such a recommendation and action would not greatly facilitate the policy considerations that lie behind the exhaustion requirement. Because the defendants supplemented the record *before* the present case was referred to the undersigned, *Baxter's* reasoning seems inapplicable here. Accordingly, there is no logical reason why the grievances attached to defendants' motion to dismiss should not be considered for exhaustion purposes. Because the statute of limitations has not run, and dismissal would be without prejudice, the case would likely be re-filed with documents on exhaustion that are before the Court attached.

Therefore, the next question is whether Plaintiff, through the grievance and appeals

attached to defendants' motion to dismiss, properly exhausted his claims against Defendants Morrison and Opanasenko. Defendants argue that although Plaintiff listed many people as subjects of his grievance, the body of the grievance dealt only with Plaintiff's poor work evaluation, upon which his First Amendment retaliation claim is partially based.

The grievance forms attached to Defendants' brief do show that the grievance was about Plaintiff's dispute with Officer Opanasenko over his claim he could not do the equipment handling job. He claims that after he complained to the "Classification Director" [Morrison] apparently about his job assignment, he was told to write a grievance. Plaintiff thereafter told Defendant Opanasenko that he could not physically do the job. Defendant Opanasenko allegedly began to harass him, insisted that Plaintiff pick up equipment and hand the items to other inmates, and stand around for 15-20 minutes, even though he still wore a neck brace and walked with a cane. Plaintiff claimed that Defendant Opanasenko "fabric[ated] an assignment evaluation form" and falsely indicated that Plaintiff had written that he sought to be removed from this detail. Defendant Opanasenko also allegedly threatened to write a ticket on Plaintiff for threatening behavior, but did not. Rather, he wrote the negative work evaluation. Plaintiff asserts generally that Morrison and Opanasenko were aware of his current condition related to his spinal cord injuries. He claims the "work assignment report" will cause Plaintiff irreparable harm hurting his chances for parole, and that these two defendants and others knew or should have known that their actions violated Plaintiff's First, Eighth, and Fourteenth Amendment rights. His grievance request for relief included an apology, suspension of Defendant Opanasenko for 7 days without pay, and removal of his negative job evaluation, and no work assignments without his "personal outside doctor's" approval and no "retaliatory actions"

against him. He even argued that "Qualified Immunity" should not shield the officials for civil damages.

At Step I, this was treated as a complaint only about the negative job evaluation which was upheld. Apparently at his interview on the grievance he "stated his only issue is that he was written a 'bad' work report that is not true".

At Step II, he complained that all of the individuals and issues were not addressed at Step I. The response indicated that "Classification" and Health Care" had cleared Plaintiff as "physically capable" for a light-duty detail like the handing out of recreation equipment. Yet, the grievance reviewer, Warden Bock, reasoned that because Defendant Opanasenko apparently signed the work evaluation both as "evaluator and Supervisor" it was improper. Thus, it was ordered to be removed from Plaintiff's file with Defendant Opanasenko allowed to "re-do" it and "have a supervisor sign it." Thus Warden Bock determined that the "[g]rievance is partially resolved at step II."

At Step III Plaintiff challenged the validity of the finding that he had been cleared by Health Care for the work assignment and claimed Warden Bock at Step II "attempt[ed] to side step and over look the issues at bar." He challenged Warden Bock permitting Officer Opanasenko to rewrite the work evaluation because of the "unreasonable practice by the Department of Corrections and it[s] agents," which would include the Classification Director specifically named at Step I. Plaintiff again asserted that the "first, eight and fourteenth Amendments protests (sic, "protects") Plaintiff from such practice and harm." He repeated his earlier demand for relief including his not being cleared for work without his personal Doctor's consent.

While not particularly "pretty" and quite conclusory, it cannot be said that this does not assert an Eight Amendment "deliberate indifference" claim against Defendants Morrison and Opanasenko and a First Amendment retaliation claim against Defendant Opanasenko. Plaintiff claims that Opanasenko harassed him and required him to perform the equipment handler position despite his injuries. Such allegations can be found sufficient for purposes of exhaustion. *Burton v. Jones*, 521 F.3d 569, 575 (6th Cir. 2003).

> [F]or a court to find that a prisoner has administratively exhausted a claim against a particular defendant, a prisoner must have alleged mistreatment or misconduct on the part of the defendant at Step I of the grievance process. In describing the alleged mistreatment or misconduct, however, we would not require a prisoner's grievance to allege a specific legal theory or facts that correspond to all the required elements of a particular legal theory. Rather, it is sufficient for a court to find that a prisoner's Step I problem statement gave prison officials fair notice of the alleged mistreatment or misconduct that forms the basis of the constitutional or statutory claim made against a defendant in a prisoner's complaint.

Id. As explained, this "fair notice" standard does not require a prisoner to provide all the details of the alleged wrongdoing and is in accord with the legislative purposes of § 1997e(a) as stated in *Porter*. *Id.* A prisoner must simply provide a sufficient statement to inform prison officials of his complaints and against whom they are directed.

While Plaintiff does not specifically name Morrison, the grievance specifically states that the "Classification Director," which is Morrison's position, and later Department of Correction "agents," required him to perform this work despite having knowledge that Plaintiff was incapable of its performance. Although the *Curry* case requires each defendant to be specifically named, where a plaintiff lists a particular position that is held by only one person, that requirement should be considered to be met.

Here, although the majority of Plaintiff's grievance does address the work report written by Opanasenko, Plaintiff also stated that his injury prevented him from performing the duties of an Equipment Handler and that both Opanasenko and the Classification Director (Morrison) required him to perform that job despite having knowledge of that fact. Mot. to Dismiss, Ex. A at 8-9. While not terribly specific, Plaintiff's grievance was sufficient to provide "fair notice" that he was grieving more than the work evaluation written by Opanasenko. He specifically raised claims that Opanasenko and Morrison should not have required him to perform the equipment handler position. The fact that the person writing the response to the Step I grievance did not address Plaintiff's allegations that Opanasenko and Morrison required him to perform work beyond his ability does not negate the fact that Plaintiff did raise those issues, albeit briefly, in his Step I grievance. He also notes that after informing Defendant Opanasenko of his condition, he was harassed and a ticket was threatened and a negative job evaluation written. This was coupled with a generalized claim that his First Amendment rights as well as his Eight Amendment rights were violated. Thus, it is found that the exhaustion requirement is satisfied with respect to Defendants Opanasenko and Morrison, and defendants' motion should be denied in that regard.

III. RECOMMENDATION

For the reasons stated above, IT IS RECOMMENDED that defendants' motion be GRANTED IN PART. Plaintiff's claims against Defendants Bock, Chaplin, Konkle, and Aldabaugh should be DISMISSED for failure to state a claim; however, his claims against Defendants Morrison and Opanasenko should not be dismissed at this time.

The parties to this action may object to and seek review of this Report and Recommendation, but are required to file any objections within ten (10) days of service of a copy of this Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1) and E.D. Mich. LR 72.1(d)(2). Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). Filing of objections which raise some issues but fail to raise others with specificity, will not preserve all the objections a party might have to this report and recommendation. *Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370,1373 (6th Cir. 1987). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this Magistrate Judge.

Within ten (10) days of service of any objecting party's timely filed objections, the opposing party may file a response. The response shall be not more than twenty (20) pages in length unless by motion and order such page limit is extended by the Court. The response shall address specifically, and in the same order raised, each issue contained within the objections.

Steven D. Pepe

Dated: July 30, 2003
Ann Arbor, Michigan

STEVEN D. PEPE
UNITED STATES MAGISTRATE JUDGE

Pursuant to Rule 9(d), Please
COPIES HAVE BEEN MAILED TO THE
FOLLOWING:
Laura Jones
Dwayne Campbell
on 7/30/03

BEST AVAILABLE COPY

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LORENZO L. JONES, #176204,

Plaintiff,

v

STATE OF MICHIGAN, et al,

Defendants.

No. 02-74336-DT

HON. VICTORIA A. ROBERTS
MAG. STEVEN D. PEPE

Lorenzo L. Jones #176204
Saginaw Correctional Facility (SRF)
9625 Pierce Road
Freeland, MI 48623

Christine M. Campbell (P31138)
Attorney for Defendants
Michigan Department of Attorney General
Corrections Division
P.O. Box 30217
Lansing, MI 48909
(517) 335-7021

FILED
02 DEC 13 P 3:09

DEFENDANTS HEREBY REQUEST THAT THE COURT DISPENSE WITH ORAL ARGUMENT UNDER LOCAL RULE BECAUSE THE PRO SE PLAINTIFF IS CONFINED IN PRISON

DEFENDANTS BOCK'S, CHAPLIN'S, MORRISON'S AND OPANASENKO'S RULE 12(b) MOTION TO DISMISS FOR FAILURE TO COMPLY WITH THE EXHAUSTION REQUIREMENT OF THE PLRA

Defendants Bock, Chaplin, Morrison, and Opanasenko, by counsel, move pursuant to Fed. R. Civ. P. 12(b) and 42 U.S.C. § 1997e (a), for a Court Order dismissing Plaintiff's Complaint based upon those grounds set forth in Defendants' accompanying brief.

WHEREFORE, Defendants request that the Court to enter its Order dismissing the above action.

Respectfully submitted,

MICHAEL A. COX
Attorney General

Christine M. Campbell (P31138)
Assistant Attorney General
Corrections Division

Dated: February 11, 2003
Campbell\2002 FED\2002027760 JONES LORENZO\motion exhaust.doc

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LORENZO L. JONES, #176204,

Plaintiff,

v

STATE OF MICHIGAN, et al,

Defendants.

No. 02-74336-DT

HON. VICTORIA A. ROBERTS
MAG. STEVEN D. PEPE

Lorenzo L. Jones #176204
Saginaw Correctional Facility (SRF)
9625 Pierce Road
Freeland, MI 48623

Christine M. Campbell (P31138)
Attorney for Defendants
Michigan Department of Attorney General
Corrections Division
P.O. Box 30217
Lansing, MI 48909
(517) 335-7021

BRIEF IN SUPPORT OF DEFENDANTS BOCK'S, CHAPLIN'S, MORRISON'S AND OPANASENKO'S RULE 12(b) MOTION TO DISMISS FOR FAILURE TO COMPLY WITH THE EXHAUSTION REQUIREMENT OF THE PLRA

This is a pro se prisoner civil rights action under 42 U.S.C. § 1983. Plaintiff has sued Barbara Bock, former Warden of the Saginaw Correctional Facility (SRF); Valerie A. Chaplin, Assistant Deputy Warden; Paul Morrison, Classification Director, Michael Opanasenko, Corrections Officer; Janet Konkle, R.N.; and Ahmad Aldabagh, M.D. To the undersigned's knowledge, Ms. Konkle and Dr. Aldabagh have not been served. Defendants Bock, Chaplin, Morrison, and Opanasenko are represented by the Attorney General.

Plaintiff's complaint alleges that he had medical injuries from a vehicle accident in 2000, which prevented him from performing his job as a recreational equipment handler. Plaintiff alleges that he was nevertheless classified to this position and forced to work. Plaintiff alleges that he was harassed by Officer Opanasenko on August 20, 2001 "when the defendant attempted to make the plaintiff remain at the recreation shack and lift up the baseball bag and hand it to another prisoner that was requesting the bag." **Complaint ¶ 27**. Plaintiff admits that he refused, and states that defendant Opanasenko threatened to place plaintiff in segregation until plaintiff learned to do what he was told. **¶ 28**. Plaintiff alleges that Officer Opanasenko wrote a poor work evaluation on August 20, 2001. **¶ 33**. Plaintiff alleges the poor work evaluation written on August 20, 2001 was retaliatory because "appeared to be threaten." *Id.*

Although he asserts in ¶ 3 that he has exhausted all his administrative remedies, plaintiff did not attach any grievance documentation to his complaint, nor does his give a grievance code number anywhere in the complaint. Plaintiff alleges that he filed a Step III grievance appeal on November 2, 2001, but as of the date of the complaint (October 17, 2002), he had not had any response.

Defendants had MDOC Prisoner Affairs check their records. One grievance was located relevant to this complaint, SRF 2001-09-1068-02A (copy of all Steps attached, Def. Ex. A). The Step III response was returned to plaintiff on November 11, 2001. Plaintiff was at SRF from April 25, 2001 until January 24, 2003, so he should have received all the grievance responses.

Looking at the Step I grievance, plaintiff initially states, "On 8/29/01 Plaintiff talked to the Classification Director, whom [sic] at that time informed Plaintiff that he should write a grievance. This grievance is being written on the following staff members: Classification Director, Health Care, Warden, deputy Warden and Officer Opanasenko, in their professional

capacity." The body of the grievance, however, relates only to Officer Opanasenko, and the primary complaint is the "poor work evaluation" given by Officer Opanasenko.

Despite the fact that the grievance was untimely[1] and could have been rejected for that reason alone, a Step I response was provided. Plaintiff told the grievant interviewer that "his only issue is that he was written a 'bad' work report that is not true [and that] Grievant was angered that this may affect his upcoming Parole Hearing."

The grievance was considered resolved, because the work evaluation 363 was rewritten. See Def. Ex. B. Omitted from the rewritten 363 was the statement "I would like to be removed from this detail," and the 363 was appropriately signed by a supervisor. The aforementioned statement is what plaintiff claimed was false; he says he never made that statement.

The Prison Litigation Reform Act, 42 U.S.C. § 1997c(a), states that "no action shall be brought with respect to prison conditions under section 1983 or any other federal law" until the prisoner has exhausted available administrative remedies. This exhaustion requirement is mandatory and applies to all cases filed after April 26, 1996. *Freeman v. Francis*, 196 F. 3d 641 (6th Cir. 1999); *Wyatt v. Leonard, et al.*, 193 F. 3d 876 (6th Cir. 1999);*Wright v. Morris*, 111 F. 3d 414 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 263 (1997); *White v. McGinnis*, 131 F.3d 593 (6th Cir. 1997).

Before filing a lawsuit in federal court, a prisoner must exhaust all his administrative remedies as to *each* claim he brings against *each* defendant he intends to sue, and demonstrate exhaustion by attaching copies of the administrative proceedings and decisions to his complaint, or if not available, describing the proceedings with specificity. *Knuckles-El, et al., v. Toombs, et al.*, 215 F. 3d 640 (6th Cir. 2000); *Curry v. Scott*, 249 F.3d 493 (6th Cir. April 30, 2001). A

[1] The "incident date" is August 20, 2001, and the "Today's Date" is September 15, 2001. The Step I grievance was received on September 25, 2001.

prisoner must exhaust *all* his claims; a case cannot proceed where there is only partial exhaustion. *Smith v. Federal Bureau of Prisons*, 300 F. 3d 721 (6th Cir. 2002); *Linder v. Sundquist*, No. 02-5303, 2002 U.S. App. LEXIS 19662 (6th Cir. Sept. 18, 2002) (unpublished, copy attached); *Kemp v. Jones*, No. 01-2744, 2002 U.S. App. LEXIS 16058 (6th Cir. Aug. 6, 2002) (unpublished, copy attached).

The PLRA places the burden on demonstrating exhaustion squarely on the shoulders of the prisoner-plaintiff. Recently, the Sixth Circuit Court of Appeals reiterated the requirement that a prisoner plaintiff must demonstrate exhaustion by attaching copies of the administrative remedies proceedings to his complaint. *Baxter v. Rose*, 305 F.3d 486 (6th Cir. 2002)[2]. The Court emphasized that the time for proving exhaustion is with the filing of the *initial* complaint. The Court said:

> [A] prisoner may not amend his complaint to cure the failure to plead the exhaustion of administrative remedies, if his action is covered by the PLRA.
>
> The PLRA requires prisoners challenging "prison conditions" to exhaust all administrative remedies before bringing a Section 1983 Action. 42 U.S. C. § 1997e(a). In *Brown v. Toombs*, 139 F. 3d 1102 (6th Cir. 1998), **we required that a prisoner bringing such an action specifically allege in his complaint that he had exhausted all administrative remedies.** *Id.* **at 1104. We also required that the plaintiff attach to his complaint the disposition(s) of his available administrative remedies.** *Ibid.*
>
> [*Baxter*, 305 F. 3d at 488 (emphasis added)]

Moreover, in *Baxter*, the Court held that a prisoner cannot amend a defective complaint to meet the exhaustion requirement.

---

[2] *Baxter* appears to simply present a reiteration or clarification of existing law, since Sixth Circuit precedent has always required that a prisoner make an affirmative showing of exhaustion with his initial pleading. See, e.g., *Brown v. Toombs*, 139 F. 3d 1102 (6th Cir. 1998); *Knuckles-El v. Toombs*, 215 F. 3d 640 (6th Cir. 2000).

The Supreme Court made it clear in *Booth v. Churner*, 531 U.S. 956; 121 S. Ct. 1819; 149 L. Ed. 2d 958 (2001) that the exhaustion requirement of 42 U.S.C. § 1997e(a) was mandatory, and that no exceptions would be allowed. The Sixth Circuit so held in *Brown* and *Knuckles-El*. *Brown* and *Knuckles-El* also set forth the requirement that a prisoner attach the grievance (or other administrative remedy) documentation to his initial complaint. The Sixth Circuit made it clear in *Curry* that a prisoner must file a grievance and exhaust the grievance procedure as to *each* claim against *each* defendant named in the complaint. The Sixth Circuit also requires that a prison totally exhaust all his claims; a case cannot proceed where only some of the claims have been exhausted. *Smith v. Federal Bureau of Prisons*, 300 F. 3d 721; *Linder v. Sundquist*, No. 02-5303, 2002 U.S. App. LEXIS 19662; *Kemp v. Jones*, No. 01-2744, 2002 U.S. App. LEXIS 16058 (6th Cir. Aug. 6, 2002). Finally, the Sixth Circuit recently reiterated in *Baxter* that demonstration of exhaustion must be made with the initial complaint, and a prisoner may not later submit documentation establishing exhaustion.

It is evident that plaintiff only exhausted his "poor work evaluation" claim against defendant Opanasenko. He has not exhausted any of his other claims against Opanasenko, nor has he exhausted his claims against the other named defendants in this action.

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, Defendants respectfully request that this Court find that Plaintiff failed to satisfy the exhaustion requirement of the PLRA, and dismiss this action in its entirety.

Respectfully submitted,

MICHAEL A. COX
Attorney General

Christine Campbell

Christine M. Campbell (P31138)
Assistant Attorney General
Corrections Division

Dated: February 11, 2003

Campbell\2002 FED\2002027760 JONES LORENZO\jones.lorenzo.02-27760.1997ea brief.doc

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

SEE CASE FILE FOR ADDITIONAL DOCUMENTS OR PAGES THAT WERE NOT SCANNED

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LORENZO L. JONES, #176204,

Plaintiff,

v

STATE OF MICHIGAN, et al,

Defendants.

No. 02-74336-DT

HON. VICTORIA A. ROBERTS
MAG. STEVEN D. PEPE

PROOF OF SERVICE

STATE OF MICHIGAN)
ss)
COUNTY OF INGHAM)

The undersigned, being first duly sworn deposes and says that on February 11, 2003, 2002 she personally mailed DEFENDANTS' MOTION TO STAY DISCOVERY, BRIEF IN SUPPORT, DEFENDANTS BOCK'S, CHAPLIN'S, MORRISON'S AND OPANASENKO'S RULE 12(b) MOTION TO DISMISS FOR FAILURE TO COMPLY WITH THE EXHAUSTION REQUIREMENT OF THE PLRA and BRIEF IN SUPPORT to the following:

TO: Lorenzo L. Jones #176204
Saginaw Correctional Facility (SRF)
9625 Pierce Road
Freeland, MI 48623

by sealing said envelope, affixing the necessary postage for first class mail thereon and placing said envelope in the United States mail at Lansing, Michigan.

Helene Lawrence
Legal Secretary

Campbell\2002 FED\2002027760 JONES LORENZO\POS.doc

BEST AVAILABLE COPY

APPENDIX E

Copy of: Clerk of The Court

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Lorenzo L. Jones,
Plaintiff,

V

Civil Case No. 02-74336-DT

Honorable: Victoria A. Roberts
Magistrate: Steven D. Pepe

STATE OF MICHIGAN et, al.
Defendant

Lorenzo L. Jones #176204 Plaintiff In Pro.se Ryan Correctional Facility 17600 Ryan Road Detroit, Michigan 48212	Christine M. Campbell P31138 Attorney For Defendants Attorney General Office Corrections Division P.O. Box 30217 Lansing, Michigan 48909

PLAINTIFF SUPPLEMENTAL RESPONSE
TO DEFENDANT'S MOTION TO DISMISS

NOW COMES The Plaintiff, Lorenzo L. Jones, through and by himself and pursuant Fed. R. of Civ. Pro. move that this Honorable Court deny the defendant's Motion to dismiss pursuant to Rule 12(b) and PLRA 42 U.S.C. § 1997(e)(a), alleging that the Plaintiff failed to exhaust administrative remedies and states in support thereof:

1. That Plaintiff exhausted all administrative remedies pertaining to all defendants contained in the Civil Rights Complaint as explained more fully in Plaintiff Brief in support of this Motion.

Dated: March 22,2003

Lorenzo L. Jones #176204
Ryan Correctional Facility
17600 Ryan Road
Detroit, Michigan 48212

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Lorenzo L. Jones,
Plaintiff,

V

Civil Case No. 02-74336-DT

Honorable: Victoria A. Roberts

Magistrate: Steven D. Pepe

STATE OF MICHIGAN et, al.
Defendant,

Lorenzo L. Jones #176204
Plaintiff In Pro.se
Ryan Correctional Facility
17600 Ryan Road
Detroit, Michigan 48212

Christine M. Campbell P31138
Attorney For Defendants
Attorney General Office
Corrections Division
P.O. Box 30217
Lansing, Michigan 48909

BRIEF IN SUPPORT OF PLAINTIFF'S
SUPPLEMENTAL RESPONSE TO DEFENDANTS MOTION TO DISMISS

Plaintiff, Lorenzo L. Jones, is a Pro.se. Plaintiff whom alleged that several prison officials violated his Civil Rights by placing him on a work assignment that was beyond his physical capabilities, that Plaintiff was harassed and retaliated against by at least one of the defendants.

On February 13,2003, the defendants filed a Motion pursuant to Rule 12(b) and 42 U.S.C. § 1997(e)(a), to dismiss, alleging that the Plaintiff had failed to exhaust all available State remedies and that Plaintiff failed to attach those exhausted remedies to the Complaint.

On February 15,2003, the Plaintiff filed his response alleging that all administrative remedies was exhausted.

On March 18,2003, the Honorable Victoria A. Roberts, referred this matter to this Honorable Court for Hearing and Determination

pursuant to 28 U.S.C. 636(b)(1)(A).

DEFENDANTS' CLAIMS WITHOUT MERIT

Dofendants first argued that the Plaintiff had failed to exhaust all available administrative remedies on several of the defendants in his Civil Rights Complaint.

In asking the Court to dismiss, the defendants relied on the authority of Knuckles-El V Toombs, et, al, 215 F3d 640 (6th Cir. 2000); Curry V Scott, 249 F3d 493 (6th Cir. 2001). In both the Knuckles-El Court, Supra at Id 641 and the Curry Court, Supra at Id 251-2, neither of the Plaintiff's had filed the necessary grievance or exhausted the necessary administrative remedies on several of the prison officials. Contrary to those Claims, Plaintiff in this Claim has exhausted all available remedies. Consequently, this Court must deny the defendants Motion to dismiss.

Next, the defendants claimed that the Plaintiff had failed to attach copies of the exhausted administrative remedies to the initial Complaint and that the Court should dismiss for that cause.

EXHAUST ADMINISTRATIVE REMEDIES

PLRA require that a prisoner [MUST] exhaust all available administrative remedies before filing a Complaint concerning prison condition. In this case, the Plaintiff filed a grievance alleging amongst other things, That defendants: officer Opanasenko, Health Care (Dr. Ahmad and Nurse Konkle), Classification (Morrison), Deputy Warden (Chaplin), and Warden (Bock), 'know, knew or should have known that their actions was in direct violations of plaintiff's,

First, Eighth and Fourteen Amendment Constitutional Rights and Civil Right, where all the above defendants required Plaintiff to work beyond that of his physical capabilities'. (see Exhibit-A-step I grievance and attached page hightlighted area). Contrary to the defendants assertion that Plaintiff did not exhaust the administrative remedies. Defendants in their pleading, supplies the Court with the exhausted administrative remedies.

WARDEN BOCK RESPONSE TO STEP II GRIEVANCE

In responding to Plaintiff allegation in step II grievance Warden Bock replied;

> 'He also alleges that he was not medically clear to work the detail issued, and the grieved parties knew or should have known, he could not perform those duties. Grievant has a special accommodation Notice in his file authorizing possession of a neck brace and wooden cane. Step I documents include verification from Health Care that Grievant was physically capable of working this assignment. Further, Classification specifically issued Grievnant a detail for Equipment Handler as a light-duty assignment, due to his medical condition. Grievant was appropriately given the job detail; Health Care verified that his medical condition does not preclude him from handing out recreation equipment. The other grieved parties, Warden Bock and ADW of programs, are not licensed medical staff, therefore must rely on Health Care's evaluation of the Grievant's medical limitation' (see Exhibit-B-step II grievance and response to step II grievance by Warden Bock). Had Plaintiff not grievance all of the above, Warden Bock would not have included the names and/or job titles in the response.

Next, the defendants alleged that the Complaint should be dismissed for Plaintiff's failure to attach copies of the exhausted administrative remedies to the initial Complaint. The defendants

cited no authorities to sustain the contention that the Complaint should be dismissed for this failure. Consequently to defendants assertion, due process will override any question of dismissal on these grounds.

In asserting the Claims, the Plaintiff adequately gave an explanation on the steps taken to exhaust the administrative remedies (see page 2 of initial Complaint). In pertinent part-a prisoner must exhaust all administrative remedies as to each claim against each defendant and demonstrate exhaustion by attaching copies of the process and the decision, or if not available, describing the proceedings. EMPHASIS ADDED. Brown V Toombs, 139 F3d 1102, 1104 (6th Cir.), cert. denied, ____ US ____; 142 LEd2d 69; 119 S Ct 88 (1998); KnucklesEl, et, al, V Toombs, et, al., 215 F3d 640 (6th Cir. 2000). Plaintiff assert that he adequately explained the steps taken, therefore complied with the requirements of exhaustion. In Michigan, the prison system has set up a III step administrative remedy system, Plaintiff herein, followed each step, received responses from each step, exhausted each step.

WHEREFORE, This Court should deny the defendants Motion to dismiss and allow the claims to continue on and be decided on it's merit.

Dated: March 22,2003

Lorenzo R. Jones #176204
Ryan Correctional Facility
17600 Ryan Road
Detroit, Michigan 48212

EXHIBIT-A-

MICHIGAN DEPARTMENT OF CORRECTIONS
PRISONER/PAROLEE GRIEVANCE FORM

4835-4247 10/94
CSJ-247A

Date Received at Step I _____ Grievance Identifier: [illegible]

Be brief and concise in describing your grievance issue. If you have any questions concerning the grievance procedure, refer to PD 03.02.130 and OP 03.02.130 available in the prison Law Library.

Name (print first, last)	Number	Institution	Lock Number	Date of Incident	Today's Date
Lorenzo L. Jones/Johnson	176204	SRF	98-1200	8/20/01	9/15/01

What attempt did you make to resolve this issue prior to writing this grievance? On what date? 8/29/01
If none, explain why. "On 8/29/01 Plaintiff talked [illegible] to the Classification Director whom at the time [illegible] informed Plaintiff that he should write a grievan This grievance is being written on the following staff members: Classificati Director, Health Care, Warden, Deputy Warden and [illegible]Officer Opanasenko, their professional capacity.

State problem clearly. Use separate grievance form for each issue. Additional pages, using plain paper, may be used. Four copies of each page and supporting documents must be submitted with this form. The grievance must be submitted to the Grievance Coordinator in accordance with the time limits of OP 03.02.130.

On July 19,2001, Plaintiff was assigned to work yard crew as an equipment handler, "meaning" Plaintiff was to hand at prisoners request, horse shoes, baseball bag (that's full of gloves, balls and two bats), basket balls, etc. While on this job, Plaintiff informed supervising officer Opanasenko (E-9), that Plaintiff was unable to handle certain equipment, such as picking up horse shoes, and baseball bag or to stand around the recreation shack for long periods of time or bending and stooping. This officer began to harass Plaintiff the same day Plaintiff worked out in the shack. Plaintiff informed a staff member that officer Opanasenko did not like him. Plaintiff will provide this officer name when he see the office, because Plaintiff does not know it right off. However, officer Opanasenko, insisted that Plaintiff pick these things up and hand them to the requesting prisoners, and stand around for 15 to 20 minutes waiting on someone to request equipment. This caused a conflict between this officer and Plaintiff. Officer Opanasenko went so far as to fabricate an assignment evaluation form, fraudulently falsified the written statement on the bottom of the work assignment evaluation, alleging that Plaintiff wrote: "I would like to be removed from this detail".

Grievant's Signature

grievance continue on page -1-

RESPONSE (Grievant Interviewed? ☐ Yes ☐ No If No, give explanation. If resolved, explain resolution.)

See Attached Response

Respondent's Signature | Date | Reviewer's Signature | Date

Respondent's Name (Print) | Working Title | Reviewer's Name (Print) | Working Title

Date Returned to Grievant:	If resolved at Step I, Grievant sign here. Resolution must be described above.	Grievant's Signature	Date

DISTRIBUTION: White, Green, Canary, Pink--Process to Step One; Goldenrod--Grievant

First Grievance

Grievance page -1- continue

as that of Plaintiff's writing, although Plaintiff signed the document as required by Classification not to be Doubled Oed, Plaintiff did not write said statement as indicated on evaluation form, officer Opanasenko also involved a Lieutenant in an attempt to have Plaintiff placed in Segregation by writing a Threaten behavior misconduct on Plaintiff, although the misconduct was never written, Plaintiff was interviewed by said Lieutenant stating that when Plaintiff refused to pick up requested equipment that Plaintiff was threatening towards him (officer Opanasenko), although at the time Plaintiff had on a neck brace and walked with a cane. NOTE: the Lieutenant became involved the day after on August 21,2001, (the incident where Plaintiff refused to lift equipment), when officer Opanasenko told him that while Plaintiff was eating morning chow, Plaintiff was marcating him (officer Opanasenko), stating that Plaintiff stare was threatening him.

At the time of the above incident, Plaintiff was wearing a neck brace and walking with a cane, (although Plaintiff still walk with a cane to this date), due to a November 14,2000 automobile accident in which my neck was broken and I suffered spinal cord injuries. Officer Opanasenko, Classification Director, Deputy Warden, Health Care and Warden were all aware of my current conditions.

The work assignment report will cause Plaintiff irreprisable harm if it remains in Plaintiff prison file, for the Michigan Department of Corrections Parole Board score points for inadequate work performance, this will add to a negative probability for parole for this Plaintiff.

[redacted]

Qualified Immunity would not shields officials from Liability for Civil Damages where their conduct was outside the scope of their duties and violated clearly established Statutory or Constitutional Rights of which a reasonable person would have known.

This matter can be partially resolved by the following: 1). a written apology from all parties involved, officer Opanasenko, Health Care, Classification, Deputy Warden and Warden, the apology can come in one letter with the above defendants names and rank on it, 2). removal of "prisoner program and work assignment evaluation" from all Plaintiff's institutional files, 3). that Plaintiff not be placed on double O status, 4). that Plaintiff will not be required to work unless cleared by personal outside doctor's and 5). no "retaliatory actions" towards Plaintiff person for any reason by any of the above named defendants or their agents or co-workers, and finally, 6). that Officer Opanasenko, Health Care (named personnel who cleared Plaintiff for such a job) and Deputy Warden be reprimanded with 7 days off work without pay. Any deviation from the above Voids any agreement between Plaintiff and the defendants.

"Thank You For Your Cooperation"

Lorenzo T. Jones/Johnson
311620[illegible]
9625 Pierce
Freeland, Michigan 48623

BEST AVAILABLE COPY

Grievance Response

Grievance Number SRF-01-09-01068-02a

GRIEVANT INTERVIEW: Grievant states he has was written a work report which is not appropriate. Grievant stated his only issue is that he was written a "bad" work report that is not true. Grievant was angered that this may affect his upcoming Parole Hearing.

INVESTIGATOR SUMMARY : Prisoner was issued a Prisoner Program and Work Assignment Evaluation on 8-21-01. This evaluation was issued appropriately and contained necessary factual information. Officer Opansenko's evaluation of Prisoner was accurate.

FINDINGS: Michigan Department of Correction Policy Directive 01.04.130 states in part, "A prisoner may challenge the accuracy of factual information in documents prepared by the Department which are contained in the prisoner's files but **may not challenge opinions, impressions and judgements contained in such documents and records.**" It is the prisoner's responsibility to present information in support of the challenge. Officer Opansenko's evaluation is considered appropriate. Therefore this grievance is denied.

EXHIBIT-B-

MICHIGAN DEPARTMENT OF CORRECTIONS
PRISONER/PAROLEE GRIEVANCE APPEAL FORM

4835-4248 12/97
CSJ-247 B

Date Received by Grievance Coordinator at Step II: _____

Grievance Identifier SRF-01-09-01068-02a

INSTRUCTIONS: THIS FORM IS ONLY TO BE USED TO APPEAL A STEP I GRIEVANCE.
The white copy of the Prisoner/Parolee Grievance Form CSJ-247A (or the goldenrod copy if you have not been provided with a Step I response in a timely manner) MUST be attached to the white copy of this form if you appeal it at both Step II and Step III.

If you should decide to appeal the Step I grievance response to Step II, your appeal should be directed to: Warden Bock by 10-18-01 If it is not submitted by this date, it will be considered terminated.

If you should decide to appeal the response you receive at Step II, you should send your Step III Appeal to the Director's Office, P.O. Box 30003, Lansing, Michigan, 48909.

Name (first, last)	Number	Institution	Lock Number	Date of Incident	Today's Date
Jones, Lorenzo	176204	SRF	12-42[illegible]	8-20-01	10-11-01

STEP II--Reason for Appeal /// In responding to Plaintiff grievance, the respondent Sgt F. Yell, failed to answer Plaintiff issues therein: 1. Plaintiff filed the within grievance on "Health Care, Warden Bock, Deputy Warden of Programs, Classification Director and Openassenko". Although the officer was supervising officer and harassed Plaintiff, the officer was "NOT" the only responsible party therein, Plaintiff was "NOT" medically clear to work such a Job do to his injuries. Therefore making all of the above defendants responsible for placing Plaintiff on such assignment. Where they know, knew or should have known that Plaintiff was physically unable to perform such a duty. Removing the work form is not a cure all in this matter only a step.

STEP II--Response

Date Received by Step II Respondent:

Respondent's Name (Print) | Respondent's Signature | Date

Date Returned to Grievant:

STEP III--Reason for Appeal

NOTE: Only a copy of this appeal and the response will be returned to you.

STEP III--Director's Response is attached as a separate sheet.

If you find the Step III Director's response unsatisfactory, you have the option of referring the grievance to the Office of Legislative Corrections Ombudsman, 4th Floor, Capitol Hall, 115 W. Allegan, Lansing, Michigan, 48913.

DISTRIBUTION: White--Central Office; Green - Canary --Step III; Pink--Step II; Goldenrod--Grievant

Response - Step II Grievance Appeal
SRF-01-09-01068-02a
Jones #176204

Grievant claims that Officer Opanansenko fabricated a negative Work Report. As the Parole Board may issue negative points to Grievant for bad work reports, which in turn may lower his probability of parole, he wants this removed from his files.

The Step I Respondent determined that the Grievant was issued a negative Prisoner Program and Work Assignment Evaluation on 8/21/01. Per PD-01.04.130, Grievant may challenge the accuracy of factual information, but may not challenge opinions, impressions and judgements in such documents and records. The Grievant is responsible for presenting information in support of his challenge. The officer's evaluation was appropriate, and the grievance was denied at Step I.

On appeal to Step II, Grievant alleges that the Step I Respondent did not answer the issues presented (i.e. he only addresses the Officer, and did not address the other parties who were grieved). He also alleges that he was not medically clear to work the detail issued, and the grieved parties knew, or should have known, he could not perform those job duties. Grievant has a Special Accommodation Notice in his file authorizing possession of a neck brace and wooden cane. Step I documents include verification from Health Care that Grievant was physically capable of working this assignment. Further, Classification specifically issued Grievant a detail for Equipment Handler as a light-duty assignment, due to his medical condition. Grievant was appropriately given the job detail; Health Care verified that his medical condition does not preclude him from handing out recreation equipment. The other grieved parties, Warden and ADW of Programs, are not licensed medical staff, therefore they must rely on Health Care's evaluation of the Grievant's medical limitations.

A review if the CAJ-363 work evaluation reveals that the reporting Officer signed the form as both Evaluator and Supervisor. *As the reporting officer should not sign the form in both places, the work report will be removed from Grievant's file. However, the reporting Officer may re-do the CAJ-363 and have the supervisor sign it.*

Staff are reminded that all CAJ-363's should be signed by a supervisor prior to processing through Classification.

Grievance is partially resolved at Step II.

Barbara N. Bock

Barbara N. Bock, Warden
Saginaw Correctional Facility
October 30, 2001

cc: Grievance Coordinator - SRF
ADW Chaplin - for action
file

MICHIGAN DEPARTMENT OF CORRECTIONS
PRISONER/PAROLEE GRIEVANCE APPEAL FORM

4835-4248 1297
CSJ-247 II

Date Received by Grievance Coordinator at Step II: 10/31/01

Grievance Identifier SRF-01-09-01068-02a

INSTRUCTIONS: THIS FORM IS ONLY TO BE USED TO APPEAL A STEP I GRIEVANCE.
The white copy of the Prisoner/Parolee Grievance Form CSJ-247A (or the goldenrod copy if you have not been provided with a Step I response in a timely manner) MUST be attached to the white copy of this form if you appeal it at both Step II and Step III.

If you should decide to appeal the Step I grievance response to Step II, your appeal should be directed to: Warden Bock by 10-18-01 if it is not submitted by this date, it will be considered terminated.

If you should decide to appeal the response you receive at Step II, you should send your Step III Appeal to the Director's Office, P.O. Box 30003, Lansing, Michigan, 48909.

Name (first, last)	Number	Institution	Lock Number	Date of Incident	Today's Date
Jones, Lorenzo	176204	SRF	12-028	8-20-01	10-11-01

STEP II--Reason for Appeal /// In responding to Plaintiff grievance, the respondent Sgt F. Bell, failed to answer Plaintiff issues therein: 1. Plaintiff filed the within grievance on "Health Care, Warden Bock, Deputy Warden of Programs, Classification Director and Opunasenko". Although the officer was supervising officer and harassed Plaintiff, the officer was "NOT" the only responsible party therein, Plaintiff was "NOT" medically clear to work such a Job do to his injuries. Therefore making all of the above defendants responsible for placing Plaintiff on such assignment. Where they know, knew or should have known that Plaintiff was physically unable to perform such a duty. Removing the work form is not a cure all in this matter only a step.

STEP II--Response

Date Received by Step II Respondent: 10/31/01

See attached response.

B. Bock, Warden - SRF	[signature]	10/30/01	Date Returned to Grievant: 10/31/01
Respondent's Name (Print)	Respondent's Signature	Date	

STEP III--Reason for Appeal /In Warden Bock response to step two grievance, Warden Bock alleged that Health Service had cleared Plaintiff for work or that the Plaintiff injuries does not preclude Plaintiff from said work assignment. That Health Care verified this. Plaintiff contest that the statement by Warden Bock is "FABRICATED" for SRF Health Service has never examined Plaintiff to make a detail of Plaintiff injuries. Next, Warden Bock attempt to side step and over look the issues at bar. According to the Warden interpretation of

CON ON NEXT PAGE-1

NOTE: Only a copy of this appeal and the response will be returned to you.

STEP III--Director's Response is attached as a separate sheet.

If you find the Step III Director's response unsatisfactory, you have the option of referring the grievance to the Office of Legislative Corrections Ombudsman, 4th Floor, Capitol Hall, 115 W. Allegan, Lansing, Michigan, 48913.

DISTRIBUTION: White--Central Office; Green - Canary --Step III; Pink--Step II; Goldenrod--Grievant

rec'd 3

AGE-1-CONTINUE

D. 01-04-130, a prisoner may challenge the accuracy of factual information ontained in a CAJ-363 work evaluation form, but may not challenge opinions, mpressions and judgments in such documents.

This interpretation leaves a prisoner who is grieved by a 363 form etween a rock and a hard place, for the information contained in such a report ould always be interpreted as an opinion, impression or judgment.

Although Warden Bock partially granted Plaintiff relief, Warden Bock onetheless give the reporting staff member an opportunity to re-write the nlawful CAJ-363 evaluation form, stating that he just could not sign the orm in both places. No doubt, the reporting staff will write the exact same valuation, leaving Plaintiff with no redress.

Plaintiff contest that the information and 363 form should not be re-lone for Plaintiff, for it was the fruit of unreasonable practice by the epartment of Corrections and it's agents, which violated Plaintiff right o be free of activities that Plaintiff may or may not be physically capable f performing, the first, eighth and fourteen Amendments protests Plaintiff rom such practice and harm, and mental and physical damages have been awarded y Courts for such actions.

Next, Warden Bock claimed that "Warden and ADW" are not licensed medical taff, therefore they must rely on Health Care of Grievant's medical limitations and therefore making neither the Warden or ADW Chaplin not esponsible, however, Warden Bock failed to realize, that she is the Warden f the institution in which Plaintiff currently reside and Chaplin is the ssistant Deputy Warden, thereby making their failure to "ACT" to a wrong ithin their control, make them just as responsible, as if directly causing he harm. For each defendant failed to act or rectify the situation.

FURTHER, Warden Bock failed to address the claim that Defendant panasenko fraudulently wrote a paragraph at the bottom of the evaluation AJ-363 form, alleging that Plaintiff himself had written the paragraph. laintiff content, that he did not write the paragraph on the CAJ-363 form that the paragraph was forged and the writer of the paragraph should be reprimanded, for it is a violation of the Michigan Department of Correction ode of ethics and should not be tolerate by those whom have sworn to up-hold the Laws and Constitutions.

In this case, the stipulation within the grievance has not been resolved s required. In order to resolve this matter, the following conditions must be met: 1). complete removal of the 363 form from all of Plaintiff's prisons files, 2). that plaintiff not be required to work unless cleared by Plaintiff's personal Doctors, Doctor's Mark Jones and Doctor Van der Harst, both are treating physician's of Plaintiff, 3). that officer Opanasenko, Health Care and Deputy Warden Chaplin be reprimanded with a minimum of 7 days "WITHOUT PAY" for their unlawful actions and 4). that no retaliatory actions be taken against Plaintiff by the above named defendants or their co-workers. Any deviation from the above VOIDS any agreement between Plaintiff and the defendants.

ated: November 2,2001

Respectfully

Mr. Lorenzo L. Jones/Johnson #176204

THIRD STEP GRIEVANCE RESPONSE

Lorenzo Jones, #176204
SRF-01-09-1068-02a

The Grievant presents an issue which alleges that he was written a bad work report that was not true. As his relief, he requested that it be removed from his file. The grievance was processed at the local level according to the provisions of Policy Directive 03.02.130 (Prisoner/Parolee Grievances) and Operating Procedure 03.02.130 (Prisoner/Parolee Grievances).

This investigator has reviewed the documents presented with the appeal to Step Three. All relevant information was considered. Based on this review, this writer finds the responses provided at Step One and Step Two adequately address the merits of the main issue grieved. The facility informed this investigator that the work report had been rewritten, the old one was removed from his file and the new one was added. This grievance is resolved.

Approval Signature: Michael A. Farrell Date: DEC 11 2001
#6/12-4/02a

02cv7436
A-[illegible]

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Lorenzo L. Jones,
Plaintiff,

V

Civil Case No. 02-74336-DT

Honorable: Victoria A. Roberts

Magistrate: Steven D. Pepe

STATE OF MICHIGAN et, al.
Defendant,

Lorenzo L. Jones #176204 Plaintiff In Pro.se Ryan Correctional Facility 17600 Ryan Road Detroit, Michigan 48212	Christine M. Campbell P31138 Attorney For Defendants Attorney General Office Corrections Division P.O. Box 30217 Lansing, Michigan 48909

STATE OF MICHIGAN)
)ss
COUNTY OF WAYNE)

AFFIDAVIT IN SUPPORT OF SUPPLEMENTAL RESPONSE

I, Lorenzo L. Jones/Johnson, being duly sworn, depose and states that:

1. Plaintiff exhausted all administrative remedies in compliance with PLRA 42 U.S.C. § 1997(e)(a).

2. Plaintiff have attached a true copy of the exhausted administrative remedies.

3. The pleadings asserted in the Plaintiff's Supplemental Response is true and accurate.

4. Plaintiff submitted step I, step II and step III grievance to the appropriate prison personnel, and those persons responded to each step.

5. The attached Exhibits represent a true copy of the Exhausted Administrative remedies.

Subscribed to and sworn before me
on this 27th day of March 2003.

[illegible]
Notary Public, Wayne County, MI
My Commission Expires Aug 14, 2004

(8)

File date
Feb. 6, 2006

No. 05-7058

IN THE

Supreme Court of the United States

LORENZO JONES,

Petitioner,

v.

MICHIGAN DEPARTMENT OF CORRECTIONS, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Michael A. Cox
Attorney General

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Linda M. Olivieri
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Attorneys for Respondents

COUNTER STATEMENT OF QUESTIONS PRESENTED

1. The Prison Litigation Reform Act requires a unique judicial screening to determine whether the inmate has a likelihood of prevailing. The PLRA also mandates exhaustion of administrative remedies prior to bringing suit. Jones's complaint failed to plead and show exhaustion with respect to some claims. Does the PLRA require dismissing Jones's complaint without prejudice and without an opportunity to amend?

2. The Prison Litigation Reform Act requires a unique judicial screening to determine whether the inmate has a likelihood of prevailing. The PLRA also mandates exhaustion of administrative remedies prior to bringing suit. Jones's complaint failed to plead and show exhaustion with respect to some claims. Does the PLRA require "total exhaustion," that is, dismissal of the entire complaint without prejudice where one or more claims remain unexhausted?

PARTIES TO THE PROCEEDINGS BELOW

1. Plaintiff-Petitioner Lorenzo Jones.

2. Defendants-Respondents, referred to collectively as "Prison Officials":

   a. Barbara Bock, Warden of the Saginaw Correctional Facility
   b. Valerie A. Chaplin, Assistant Deputy Warden
   c. Paul Morrison, Classification Director
   d. Michael Opanasenko, Corrections Officer

3. Petitioner erroneously lists the following as Respondents:

   a. Janet Konkle, R.N.
   b. Ahmad Aldabagh, M.D.

While Konkle and Aldabagh were named as Defendants in the complaint, they were not served with process and are not Respondents here. Petitioner recognized this error in a November 2005 letter to this Court.

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I. Because the PLRA provides for a unique pre-service screening for prisoner litigation and mandates exhaustion of administrative remedies, the statue requires pleading and showing exhaustion 1

A. Because the PLRA provides for a unique pre-service screening for prison litigation, the exhaustion requirement is a pleading requirement that mandates exhausting administrative remedies before filing suit 2

B. Rules 8 and 15 do not countenance the pre-service screening aspect of the PLRA 3

C. Where court rules conflict with the later-enacted PLRA, the PLRA controls. 3

D. The dismissal without prejudice does not implicate the statute of limitations 8

E. Where the Court of Appeals did not err, this petition should be denied. 8

II. This Court should deny the Petition because the Court of Appeals decision pursuant to the Prison Litigation Reform Act, requiring "total exhaustion" of all administrative remedies against all parties, is consistent with the plain language of the statute and the intent of Congress. 8

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STATUTORY AND OTHER PROVISIONS INVOLVED

1. 28 USC § 1915A provides:

(a) Screening. The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.

(b) Grounds for dismissal. On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint—

(1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or

(2) seeks monetary relief from a defendant who is immune from such relief . . .

2. 42 USC § 1997e(a) of the Prison Litigation Reform Act of 1995, Pub L 204-134, 110 Stat 1321 (1996) provides:

Applicability of administrative remedies. No action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 USC § 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

3. 42 USC § 1997e(c)(1) provides:

(1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 USC § 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.

4. 42 USC § 1997e(g) provides:

(1) Any defendant may waive the right to reply to any action brought by a prisoner confined in any jail, prison, or other correctional facility under section 1979 of the Revised Statutes of the United States (42 USC § 1983) or any other Federal law. Notwithstanding any other law or rule of procedure, such waiver shall not constitute an admission of the allegations contained in the complaint. No relief shall be granted to the plaintiff unless a reply has been filed.

(2) The court may require any defendant to reply to a complaint brought under this section if it finds that the plaintiff has a reasonable opportunity to prevail on the merits.

5. Fed R Civ P 8 provides:

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

(b) Defenses; Form of Denials. A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, the pleader may make denials as specific denials of designated averments or paragraphs or may generally deny all the averments except such designated averments or paragraphs as the pleader expressly admits; but, when the pleader does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, the pleader may do so by general denial subject to the obligations set forth in Rule 11.

(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(d) Effect of Failure to Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) Pleading to be Concise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.

6. Fed R Civ P 15(a) provides:

Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise, a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

REASONS FOR DENYING THE PETITION

I. Because the PLRA provides for a unique pre-service screening for prisoner litigation and mandates exhaustion of administrative remedies, the statue requires pleading and showing exhaustion.

The Prison Litigation Reform Act (PLRA) changed the procedures for processing litigation brought by prisoners with respect to prison conditions. The pre-screening and mandatory exhaustion requirements of the PLRA conflict with and supersede the general procedures embodied in Federal Rules of Civil Procedure 8 and 15.

While the Prison Officials concur that there is conflict among the circuit courts with respect to whether inmates must plead and show exhaustion of administrative remedies in the initial complaint, the Court of Appeals in the case at hand correctly applied the PLRA and dismissed the complaint without prejudice. While Jones claims that 20,000 cases are affected by this issue each year, that is an exaggeration. First, inmates who plead and demonstrate exhaustion of administrative remedies proceed with their actions without interruption in any circuit. Second, inmates in circuits that treat the exhaustion mandate as an affirmative defense are not affected by the Court of Appeals decision at all. And, third, those who bring actions in the circuits that place the burden on the inmates to plead and demonstrate exhaustion, either comply with the requirement or experience a dismissal without prejudice, and can bring their action again. Thus, substantially fewer than all of the approximately 20,000 prisoner cases filed each year are affected by this pleading requirement. Further, inmates whose complaints are dismissed "without prejudice" are obviously not prejudiced. Therefore, under every circuit court's interpretation of the PLRA, inmates are not prejudiced and the split among the circuits is tolerable.

This Court should therefore deny the instant petition for certiorari.

An analysis of the PLRA and Rules 8 and 15 demonstrates that the Court of Appeals properly dismissed this case without prejudice for the following reasons.

A. Because the PLRA provides for a unique pre-service screening for prison litigation, the exhaustion requirement is a pleading requirement that mandates exhausting administrative remedies before filing suit.

Section 1915A provides that district courts shall screen ". . . before docketing, if feasible or, in any event, as soon as is practicable after docketing" prisoner complaints against governmental officials or entities to determine, among other things, whether they state claims on which relief may be granted.[1] As the Court of Appeals noted in *Baxter v Rose,*[2] the PLRA sets up a unique screening process that puts the burden on the courts to determine whether the complaint states a claim upon which relief can be granted, even before the complaint is served on a defendant. The courts would be prevented from efficaciously screening cases if the plaintiffs could, through obscure pleading, circumvent the PLRA requirement to state a claim upon which relief could be granted, or face dismissal without prejudice prior to service of process.[3]

The *Baxter* decision relied on by the Court of Appeals here is supported by opinions of this Court. In *Porter v Nussle,*[4] this Court ruled that exhaustion of administrative remedies is required for all prisoner litigation, stating: ". . . exhaustion is a prerequisite to suit." Further, this Court opined that Congress intended the PLRA to upgrade the caliber of prisoner litigation: "Beyond doubt, Congress enacted § 1997e(a) to reduce the quantity and improve the quality of prisoner suits; to this purpose, Congress afforded corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case."[5] And this Court

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[1] 28 USC § 1915A.
[2] *Baxter v Rose*, 305 F 3d 486, 490 (CA 6 2002).
[3] *Baxter*, 305 F 3d at 490.
[4] *Porter v Nussle*, 534 US 516, 524 (US 2002).
[5] *Porter*, 534 US at 524-25 (emphasis added).

recognized that: "the PLRA establishes a different regime."[6] This Court further [illegible] that one of the PLRA's "dominant concern[s]" is to "foster better prepared litigation of claims aired in court."[7]

B. Rules 8 and 15 do not countenance the pre-service screening aspect of the PLRA.

In discussing Fed R Civ P 8 (a), this Court stated: "This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims."[8] But the statute at issue here does not countenance waiting until discovery to dispose of unmeritorious claims. The general provisions of the Rule 8 are therefore superseded by the specific PLRA statutory provisions.

Similarly, Rule 15 (a)'s direction to freely permit amendment of the complaint when justice requires it appears to be at odds with mandatory exhaustion in combination with the PLRA's judicial screening process. Rule 15 can be interpreted, in light of the PLRA's provisions, to deny amendments because justice requires denial. In the alternative, to the extent there is a conflict between Rule 15(a) and the statute, the statute takes precedence.

C. Where court rules conflict with the later-enacted PLRA, the PLRA controls.

Congress delegated rule-making authority to this Court. But Congress may still enact and has in fact enacted, Rules of Practice and Procedure or Evidence directly.[9] And Congress can enact statutes that supersede pre-existing rules:

> Congress has plenary power to adopt a statute that supersedes an existing rule. If an inconsistent statute is enacted after the effective date of a rule, the statute takes precedence and is deemed to supersede or modify the conflicting rule, provided

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[6] *Porter*, 534 US at 525.
[7] *Porter*, 534 US at 528.
[8] *Swierkiewicz v Sorema N.A.*, 534 US 506, 512 (2002).
[9] *See* the direct Congressional changes to the Federal Rules of Evidence in 1994. Pub L No 103-322, Title XXXII, §§ 320935(a), 320935(e) and Title IV, § 40141(b), 103d Congress, September 13, 1994; *see also* Fed R Evid 412-415.

> that the congressional intent is clear. If it is unclear, the courts will strive to construe the statute in harmony with the rule to the extent possible.[10]

In *Henderson v United States,*[11] this Court addressed a conflict between a Rule and an earlier enacted statute. In *Henderson*, this Court held that a provision of the Suits in Admiralty Act that required service of process "forthwith" had been displaced by the later adoption of Rule 4 that provided for 120 days to serve a complaint, which time could be expanded at the court's discretion. The "forthwith" provision of the statute therefore has no current force or effect. This Court relied on the fact that the Admiralty Act went into effect 18 years before the advent of the Federal Rules. And the Rules Enabling Act[12] that provides that this Court can prescribe rules of practice and procedure in the federal courts, includes a provision indicating that the Rules supersede all previously-enacted laws that conflict with them: "Such rules shall not abridge, enlarge or modify any substantive right. All law in conflict with such rules shall be of no further force or effect after such rules have taken effect."[13]

In *Radzanower v Touche Ross & Co*, this Court also addressed repeals by implication:

> "It is, of course, a cardinal principle of statutory construction that repeals by implication are not favored." *United States v United Continental Tuna Corp*, 425 US 164, 168 n9. There are, however, "two well-settled categories of repeals by implication - (1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier

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[10] *Moore's Federal Practice* §1.06. *See e.g., Traverse Bay Area Intermediate School Dist v Hitco, Inc,* 762 F Supp 1298, 1301 (WD Mich 1991) and *United States v Sharon Steel Corp*, 681 F Supp 1492, 1495-96 (D Utah 1987), holding that the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 USC § 9601, *et seq*, provision that defines "corporation" supersedes Fed R Civ P 17(b) for purposes of a CERCLA action against a dissolved corporation. *But see e.g., United States v Gustin-Bacon Div Certain-Teed Prod Corp.*, 426 F 2d 539, 542 (CA 10), *cert denied*, 400 US 832 (1970) (holding that the Civil Rights Act of 1964 did not supersede Fed R Civ P 8 on pleadings).

[11] *Henderson v United States,* 517 US 654 (1996).

[12] Rules Enabling Act, 28 USC § 2071, *et seq*.

[13] *Id* at § 2072(b).

> act. But, in either case, the intention of the legislature to repeal must be clear and manifest . . ." *Posadas v National City Bank*, 296 US 497, 503.[14]

Courts have consistently ruled that the Rules Enabling Act's supersession clause provides that subsequent procedural statutes passed by Congress supersede any prior, conflicting Federal Rule. And specifically that PLRA provisions supersede conflicting earlier-adopted court rules.[15] Here, where the later-enacted PLRA sets forth a unique procedure for screening prisoner litigation prior to service of process, the PLRA conflicts with the generally applicable provisions of the earlier-adopted Rule 8 and Rule 15, the PLRA controls as the Court of Appeals, in its *Baxter* decision, recognized:

> Unlike in typical civil litigation, courts discharging their screening duties under the PLRA must not wait until the complementary rules of civil procedure, such as civil discovery or responsive motions, are implemented by the defendant. While the Federal Rules of Civil Procedure shift the burden of obtaining clarity to the defendant, the PLRA shifts that burden to the courts. The heightened pleading requirement, in cases to which the PLRA applies, effectuates the PLRA's screening requirement.[16]

In *Baxter* the Court of Appeals also appropriately distinguished *Swierkiewicz v Sorema*. Unlike the **judicially-created** heightened pleading requirements that this Court struck down in *Swierkiewicz v Sorema*,[17] the PLRA's heightened pleading requirement is inherent in the **statute**. *Swierkiewicz* involved plaintiff's claim for employment discrimination. In *Swierkiewicz*, this Court noted that the complaint stated claims upon which relief could be granted.[18] But that is not the case here, where the PLRA provides that "no action shall be brought" absent exhaustion

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[14] *Radzanower v Touche Ross & Co*, 426 US 148, 154 (1976).
[15] For example: *Callihan v Schneider*, 178 F 3d 800, 802-03 (CA 6 1999) (holding the PLRA repealed earlier-enacted provisions of Fed R Civ P 24(a)); *Floyd v United States Postal Service*, 105 F 3d 274, 277-78 (CA 6 1997) (holding that where the PLRA conflicts with the earlier-adopted Fed R Civ P 24(a), the statute controls); and *Jackson v Stinnett*, 102 F 3d 132, 135-36 (CA 5 1996) (holding the PLRA repeals Fed R Civ P 24(a) to the extent of the conflict between the two).
[16] *Baxter*, 305 F 3d at 490.
[17] *Swierkiewicz v Sorema*, 534 US 506 (2002).
[18] *Swierkiewicz*, 534 US at 514.

of administrative remedies.[19] In prison litigation regarding conditions of confinement, where the plaintiff does not allege exhaustion, no claim upon which relief can be granted is stated, and the PLRA requires dismissal without prejudice. Further, the analogy to employment discrimination cases which require exhaustion of administrative remedies does not fit the instant case, because employment discrimination cases are not subject to pre-service screening as PLRA cases are.

This Court noted in *Swierkiewicz* that: "The prima facie case under *McDonnell Douglas*, however, is an evidentiary standard, not a pleading requirement."[20] Further, in *Swierkiewicz*, this Court relied on the fact that not every employment discrimination case required proof of all elements of the prima facie case:

> Under a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case because the *McDonnell Douglas* framework does not apply in every employment discrimination case. For instance, if a plaintiff is able to produce direct evidence of discrimination, he may prevail without proving all the elements of a prima facie case.[21]

But this is not true in the instant case, where the requirement to exhaust administrative remedies does apply to every suit that the PLRA encompasses, and where exhaustion of administrative remedies is a pleading requirement.

Unlike in an employment discrimination case, the unique PLRA screening process does require a prisoner to state a claim upon which relief can be granted in the initial complaint, or experience dismissal without prejudice. The *Swierkiewicz* decision is not controlling here. The Court of Appeals application of the PLRA in the instant case comports with a premier purpose of that act: to decrease the quantity and increase the quality of prisoner litigation. As this Court is well aware, prisoner complaints are frequently lengthy, rambling, and are devoid of any editorial judgment with respect to inclusion of claims ranging from valid to marginal to meritless. The

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[19] 42 USC § 1997e(a).
[20] *Swierkiewicz*, 534 US at 510.
[21] *Swierkiewicz*, 534 US at 511.

PLRA, as applied by the Court of Appeals here, requires the inmate to at least give enough thought to the allegations to assure that exhaustion of administrative remedies is complete for all claims, before requiring a defendant to respond to the complaint. The PLRA provision that relieves the defendant from the general requirement to promptly file an answer after service of a complaint and provides that "[t]he court may require any defendant to reply to a complaint . . . if it finds that the plaintiff has a reasonable opportunity to prevail on the merits"[22] support the Court of Appeals interpretation of the PLRA requiring plaintiffs to plead and demonstrate exhaustion. Where exhaustion is mandatory, but the plaintiff has not alleged exhaustion, a district court could not find that the plaintiff had a reasonable chance to prevail on the merits. Again, this aspect of the judicial screening requirement in combination with the mandatory exhaustion requirement supports the Court of Appeals decision in this case.

Similarly, as the Court of Appeals recognized in *Baxter*, there is tension between Rule 15(a)'s provision that leave to amend a complaint should be freely given and the PLRA's initial screening requirement.[23] But *Baxter* held that "A plaintiff who fails to allege exhaustion of administrative remedies though 'particularized averments' does not state a claim on which relief may be granted, and his complaint must be dismissed *sua sponte*."[24] The Court of Appeals recognized that the possibility of amendment would subvert the screening process, keeping the courts from efficiently determining whether the plaintiff complied with the exhaustion requirement.[25] Again, to the extent there is a conflict between Rule 15(a) and the later-enacted PLRA, the Court of Appeals correctly applied the provision of the superseding statute. The

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[22] 42 USC § 1997e(g)(2) (emphasis added).
[23] *Baxter*, 305 F 3d at 489 n 3.
[24] *Baxter*, 305 F 3d at 489 (citing *Knuckles El v Toombs*, 215 F 3d 640, 642 (CA 6 2001); *Brown v Toombs*, 139 F 3d 1102, 1104 (CA 6 1998)).
[25] *Baxter*, 305 F 3d at 490.

Court of Appeals appropriately affirmed the district court's dismissal of this case without prejudice. The petition for certiorari should be denied.

D. The dismissal without prejudice does not implicate the statute of limitations.

The statute of limitations is not a concern because the statute is tolled while the inmate exhausts administrative remedies.[26] Further, from the date of service on the defendant, until the dismissal without prejudice, the statute of limitations is also tolled. Once the case is dismissed, the statute resumes running.[27] So Jones is not disadvantaged by the dismissal without prejudice.

E. Where the Court of Appeals did not err, this petition should be denied.

In deciding that prisoner litigation covered by the PLRA must be dismissed where the initial complaint did not plead and show exhaustion of administrative remedies, the Court of Appeals appropriately considered the PLRA provisions in light of Federal Rules of Civil Procedure 8 and 15. The PLRA's mandatory exhaustion provision, in combination with its requiring the courts to screen PLRA litigation before service of the complaint to determine whether the plaintiff has failed to state a claim upon which relief can be granted, require dismissal without prejudice. The instant petition should therefore be denied.

II. This Court should deny the Petition because the Court of Appeals decision pursuant to the Prison Litigation Reform Act, requiring "total exhaustion" of all administrative remedies against all parties, is consistent with the plain language of the statute and the intent of Congress.

As with question one, the Respondents acknowledge that the federal courts of appeals are split on the issue of whether a prisoner must totally exhaust all of his administrative remedies against all parties or face dismissal of the entire complaint without prejudice. But the split is not

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[26] *Brown v Morgan*, 209 F 3d 595 (CA 6 2000).
[27] *Federal Kemper Ins Co v Isaacson*, 145 Mich App 179 (1985).

as wide as Petitioner suggests. Currently, two Circuits (the Sixth and Tenth) have adopted a total exhaustion rule.[28] In addition, the Third Circuit implemented total exhaustion in an unpublished decision.[29] Two Circuits (the Second and Ninth) have adopted a partial exhaustion rule which allows prisoners to proceed forward on their exhausted claims while their unexhausted claims will be dismissed.[30]

Two Circuits (the "Fifth and the Seventh) have not squarely addressed total exhaustion but indicated an exhausted claim might proceed despite the complaints including an unexhausted claim that is subject to dismissal. The Fifth Circuit in *Johnson v Johnson* allowed exhausted claims to be litigated, while dismissing unexhausted claims. But the Court did not directly address total exhaustion, specifically noting that Defendants had not argued for implementation of total exhaustion.[31] Thus, it appears total exhaustion is an open question in the Fifth Circuit.

Similarly, the Seventh Circuit in *Lewis v Washington*[32] upheld the trial court's dismissing one claim for lack of exhaustion and remanded the remaining claim to determine whether Plaintiff had exhausted that claim. But the Seventh Circuit did not explicitly address the total exhaustion concept. From the decision which never refers to any arguments by Defendants, it appears that the district court probably dismissed the case prior to service. It appears that the Seventh Circuit was not presented with a total exhaustion argument. The Seventh Circuit has not expressly accepted or rejected total exhaustion. The Eighth Circuit has taken a position

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[28] *Jones Bey v Johnson*, 407 F 3d 801, 809 (CA 6 2005); *Ross v City of Bernalillo*, 365 F 3d 1181, 1190 (CA 10 2004).

[29] *Vazquez v Ragonese*, unpublished per curiam opinion, No. 05-1203, 2005 US App LEXIS 16118 (CA 3 August 4, 2005).

[30] *Ortiz v McBride*, 380 F 3d 649 (CA 2 2004); *Lira v Herrera*, 427 F 3d 1164 (CA 9 2005).

[31] *Johnson v Johnson*, 385 F 3d 503 at 523 n 15 (CA 5 2004).

[32] *Lewis v Washington*, 300 F 3d 829 (CA 7 2002).

somewhere in the middle whereby a prisoner is allowed to amend the complaint to include only the exhausted claims.[33]

This Court should deny the petition in this case because the Sixth Circuit's adoption of the total exhaustion rule is correct and should not be over-turned. And, the conflict among the Circuit is not as stark as Petitioner suggests. Many Circuits have not directly addressed total exhaustion.

The Sixth Circuit's decision in *Jones Bey*, along with decisions of the Third and Tenth Circuits is correct because it is consistent with the text of the statute and supported by its legislative history.[34] In adopting the total exhaustion rule, the Court of Appeals for the Sixth Circuit held, "We adopt the total exhaustion rule, in large part, because the plain language of the statute dictates such a result."[35] The PLRA specifically states that:

> No action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 USC § 1983), or any other Federal law, by a prison confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.[36]

Thus, the plain language of the Act prohibits any entire action from even going forward absent total exhaustion. Congress distinguished between the term "actions" and "claims" in 42 USC § 1997e(c)(1) and (2). Congress indicated that courts shall dismiss "[A]ny action that is frivolous, malicious or fails to state a claim."[37] The very next section provides that a court may dismiss a claim if it is frivolous, malicious, or fails to state a claim.[38] Congress clearly drew a distinction between a claim, which is an individual allegation, and an action, which is an entire

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[33] *Graves v Norris*, 218 F 3d 884 (CA 8 2000); *Kozohorsky v Harmon*, 332 F 3d 1141, 1144 (CA 8 2003).
[34] *Ross*, 365 F3d at 1190.
[35] *Jones Bey*, 407 F 3d at 807.
[36] 42 USC § 1997e(a).
[37] 42 USC § 1997e(c)(1).
[38] 42 USC § 1997e(c)(2).

lawsuit. The use of the word "claims" in the Act indicates that claims are individual allegations while actions are entire lawsuits.

As the Sixth Circuit noted in making the distinction between the terms "action" and "claim":

> If a district court is presented with a "mixed" petition, it has the power under subsection (c)(2) to dismiss any frivolous claim, exhausted or not, *with prejudice*. However, dismissal under subsection (a) allows the court to dismiss the entire action *without prejudice*. The *Smeltzer* court recognized that Congress must have intended that courts could use subsection (c)(2) to dismiss unexhausted claims as frivolous to keep them from "holding up" the others. *Smeltzer v Hook*, 235 F Supp 736, 744 (WD Mich 2002). In the alternative the court could dismiss the entire action without prejudice and allow the prisoner to refile only exhausted claims.[39]

A rule requiring total exhaustion is consistent with this Court's habeas corpus jurisprudence.[40] In *Jones Bey*, the Sixth Circuit drew an analogy between the PLRA and the rule requiring total exhaustion in the habeas corpus context.

> Additionally, adopting the total exhaustion rule creates comity between § 1983 claims and habeas corpus claims. The Supreme Court requires total exhaustion in habeas cases to allow the state courts the first opportunity to solve prisoners' cases because they are arguably in a better position to analyze and solve the problems. See *Preiser v Rodriguez*, 411 US 475 492; 36 L Ed 2d 439; 93 S Ct 1827 (1973). The PLRA, too, was enacted to allow state prison systems the first chance to solve problems relating to prison conditions. Because both bodies of law were created for similar reasons, their exhaustion rules should be interpreted in a similar manner.[41]

Moreover, the total exhaustion rule is consistent with the overall policy of the PLRA. As this Court recognized, "Beyond doubt, Congress enacted § 1997e(a) to reduce the quantity and improve the quality of prisoner suits."[42] A total exhaustion requirement satisfies the policy objectives in the Act in several ways.

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[39] *Jones Bey*, 407 F 3d at 807.
[40] *Rose v Lundy*, 455 US 509, 512 (1982).
[41] *Jones Bey*, 407 F 3d at 807-08.
[42] *Porter v Nussle*, 534 US at 524.

First, the district courts will not have to sort through each often lengthy, rambling complaint to make a determination as to which claims are exhausted and which are unexhausted. A partial exhaustion rule would require courts to spend scarce judicial resources sorting through often voluminous records to determine which, if any, claims could proceed. And the legislative history of the PLRA supports the Court of Appeals' ruling here. Senator Kyl explained[43] the need for the statutory reform of mandatory exhaustion of administrative remedies by referring a comment by Chief Justice Rehnquist in his dissent in *Cleavinger v Saxner*[44]: "With less to profitably occupy their time than potential litigants on the outside, and with a justified feeling that they have much to gain and virtually nothing to lose, prisoners appear to be far more prolific litigants than other groups in the population." Inmates have virtually endless time to complain about every perceived wrong, large and small. While this often results in their filing lengthy, rambling complaints, it also means that they have the time to pare it down and sue only for claims they have exhausted. And they also have the time to do it over, if the court dismisses the case due to failure to totally exhaust.

Absent total exhaustion the courts will be mired in the screening process, sorting through piles of documents, trying to determine whether the inmate exhausted his claim in all steps of the grievance process against, for example the warden, or if the inmate mentioned the warden only in step three of the grievance process when the inmate decided he did not like the warden's response at step two. In one complaint, this process could be repeated for dozens of grievances, and tripled for the three-step process. This result would be inconsistent with the intent of the PLRA to improve the quality of the lawsuits. The PLRA was not intended to place the burden of sorting each exhausted claim out of the pile of unexhausted claims. The Court of Appeals interpretation of the statute as requiring the court to dismiss a case where even one claim in a

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[43] 141 Cong Rec S7527 (daily ed May 25, 1995).

complaint remains unexhausted is consistent with the legislative intent to place the burden on the inmate to show that the Corrections Officials have been given the opportunity to correct the alleged problem, before bringing the matter to court. Consistent with the PLRA's legislative history, total exhaustion requires the inmate to take the time to sort it out and re-file only exhausted claims, if the complaint contains even a single unexhausted claim.

Second, the total exhaustion rule avoids piecemeal litigation.[45] If a prisoner were allowed to proceed on some claims and not others, the prisoner could subsequently bring a second lawsuit requiring the district court to once again expend scarce judicial resources reviewing each and every claim in the new action to determine which claims, if any, are unexhausted. This could result in a series of lawsuits dealing with the same set of operative facts, pending at different stages of discovery, summary judgment, etc. Total exhaustion, in contrast, promotes judicial efficiency because it is much more likely to result in a single action dealing with all claims arising out of the same set of operative facts. And since the dismissal for failure to comply with total exhaustion is necessarily without prejudice, the inmate has the opportunity to bring the action again, pleading only exhausted claims.

Third, the total exhaustion rule has collateral effects that support the policy objectives of the statute by encouraging prisoners and prison officials to make full use of the prison grievance procedure.[46] Congress intended that prison officials, not the Federal courts, have the first opportunity to resolve a prisoner's complaints. The Federal courts must be the last step, not the first step, when a prisoner has a conflict with prison officials. The total exhaustion rule maximizes the incentive for prisoners to make use of the grievance process.

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[44] *Cleavinger v Saxner*, 474 US 193, 211 (1985) (Rehnquist, J. dissenting) (emphasis added).
[45] *Jones Bey*, 407 F 3d at 808; *Ross*, 365 F 3d at 1190.
[46] *Jones Bey*, 407 F 3d at 807; *Ross*, 365 F 3d at 1190.

Finally, this rule aids the Federal courts by ensuring that there is a full administrative record to review for each of the prisoner's claims.[47]

The PLRA requirement that no action shall be brought absent exhaustion of administrative remedies, and its provision for judicial screening, requires that a complaint that alleges some exhausted claims as well as some unexhausted claims must be dismissed without prejudice in its entirety.

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[47] *Jones Bey*, 407 F 3d at 807; *Ross*, 365 F 3d at 1190.

CONCLUSION

Since the Court of Appeals did not err in dismissing Jones's complaint without prejudice, this Court should deny the petition for certiorari.

Respectfully submitted

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Lorenzo L. Jones,

Petitioner,

v.

Barbara Bock et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit

REPLY BRIEF FOR THE PETITIONER

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February 23, 2006

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REPLY BRIEF FOR THE PETITIONER

This case presents two questions: (1) whether the Prison Litigation Reform Act ("PLRA"), Pub. L. 104-134, 110 Stat. 1321 (1996), requires a prisoner plaintiff to attach proof of administrative exhaustion to his or her complaint or, in the absence of such documentary proof, to explain with particularity how his or her administrative grievances were exhausted; and (2) whether the presence of one or more unexhausted claims requires a federal court to dismiss the prisoner's civil rights action in its entirety without leave to amend. Respondents do not dispute that the federal courts of appeals are intractably divided over the questions presented. Respondents do not dispute that the questions presented recur with great frequency and are important. Respondents do not dispute that this case is an appropriate vehicle to resolve the questions presented. Having not rebutted any of the reasons articulated in Rule 10 of this Court for granting certiorari, respondents' nevertheless argue that certiorari should be denied because the court of appeals correctly decided the case below.

For the reasons articulated in the petition, in petitioner's supplemental brief, in the *amici* brief of D.C. Prisoners' Legal Services Project Inc. *et al.*, and in this reply brief, the petition merits this Court's review and rejection of respondents' premature and misplaced merits-based arguments.

A. This Petition Presents Two Square Circuit Conflicts Meriting this Court's Review

Respondents do not dispute that the court of appeals' decisions on both questions presented squarely conflict with those of other circuits. *See* BIO at 1, 8. Although respondents do not dispute our presentation of the split over the first question presented – the "plead and show exhaustion" question – *compare* Pet. at 11-15 *with* BIO at 1-8, they contend that the conflict over the second question presented – the "total exhaustion" question – is "is not as wide as Petitioner suggests," BIO at 8-9; *see also id.* at 10. In particular, respondents note that, while the Fifth and Seventh Circuits have "indicated that an exhausted claim might proceed despite the complaints including an unexhausted claim," neither circuit

has "expressly accepted or rejected total exhaustion." BIO at 9. We will not quibble with respondents over whether the Fifth and Seventh Circuits have conclusively ruled on the question.

Whether the split is characterized as a 3-1-4[1] or 3-1-2[2] split is irrelevant to the need for this Court to promptly resolve the courts of appeals' disagreement over the "total exhaustion" issue. First, the inter-circuit conflict is well-recognized, entrenched, and shows no signs of resolving itself. The circuit split is well-recognized. *See, e.g., Lira*, 427 F.3d at 1170 (surveying split and noting "conflicting results"); *Beltran v. O'Mara*, 405 F. Supp. 2d 140, 156-57 (D.N.H. 2005) (cataloguing split). The circuit split is entrenched and shows no signs of resolving itself. For example, both the Sixth and Ninth Circuit – the two courts of appeals to have most recently published decisions on the issue and whose decisions fall on opposite sides of the inter-circuit conflict – each denied rehearing en banc on the issue.[3] Moreover, the Second, Sixth, Eighth, Ninth, and Tenth Circuits all continue to apply their prior published decisions on the "total exhaustion" issue to new cases.[4]

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[1] Under this presentation of the split, the Third, Sixth, and Tenth Circuits apply a strict "total exhaustion" requirement, *see Jones Bey v. Johnson*, 407 F.3d 801, 805 (CA6 2005), *cert. filed* 74 U.S.L.W. 3424 (Jan. 9, 2006) (No. 05-874); *Vasquez v. Ragonese*, 142 Fed. Appx. 606, 606 (CA3 2005), *cert. filed* (Nov. 22, 2005) (No. 05-8894); *Ross v. City of Bernalillo*, 365 F.3d 1181, 1189 (CA10 2004), the Eighth Circuit falls in the middle by allowing prisoner plaintiffs to avoid dismissal of their entire complaint by allowing them to amend their complaints and delete any unexhausted claims, *see Kozohorsky v. Harmon*, 332 F.3d 1141, 1144 (CA8 2003), and the Second, Fifth, Seventh, and Ninth Circuits apply a partial exhaustion rule that allows a district court to dismiss only unexhausted claims, *see Lira v. Herrera*, 427 F.3d 1164, 1170 (CA9 2005), *cert. filed* 74 U.S.L.W. 3425 (Jan. 6, 2006) (No. 05-878); *Johnson v. Johnson*, 385 F.3d 503, 533 (CA5 2004); *Ortiz v. McBride*, 380 F.3d 649, 656-63 (CA2 2004), *cert. denied*, 125 S. Ct. 1398 (2005); *Lewis v. Washington*, 300 F.3d 829, 836 (CA7 2003).

[2] This presentation of the circuit split is the same as that presented *supra* at fn. 1, except that it presumes that the Fifth and Seventh Circuits have not yet chosen a side.

[3] The Sixth Circuit denied rehearing en banc in *Jones Bey* on October 13, 2005, and the Ninth Circuit did the same in *Lira* on December 13, 2005. This information is verifiable on the public PACER dockets for these cases. Because these dockets present facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," Fed. R. Evid. 201(b)(2), this Court may properly take judicial notice of them.

[4] Most recently, the Second Circuit applied *Ortiz* in *Dukes v. Dep. Supt. of Sec. A*, 153 Fed. Appx. 772, 773 (CA2 2005), the Sixth Circuit applied *Jones Bey* in the cases below, the Ninth Circuit applied *Lira* in *Del Raine v. Femme*, No. 03-57045, 2006 WL 64134, *1 (CA9 Jan. 9, 2006), the Eighth Circuit applied *Kozohorsky* in *Harris v. Kemna*, 155 Fed. Appx. 941, 941 (CA8 2005), and the Tenth Circuit applied *Ross*'s "total exhaustion" rule in *Strope v. McKune*, No. 05-3344, 2006 WL 246138, *1 (CA10 Feb. 2, 2006).

Only this Court can bring needed uniformity to the questions presented, and as we show *infra* at pp. 3-6, the need for this Court's intervention is urgent.

B. The Questions Presented Recur with Great Frequency and Are Important

Respondents do not dispute that the questions presented recur with great frequency and are important. As explained in the petition, prison civil rights suits outnumber every other kind of civil suit, including federal petitions for writs of habeas corpus. *See* Pet. at 10. We noted in the petition that "[t]he first question presented involves an issue relevant to every one of the over 20,000 PLRA complaints filed each year because the issue affects how every PLRA plaintiff in the country must plead their prison condition claims." *Id.* Respondents argue that "this is an exaggeration" because "substantially fewer than all of the approximately 20,000 prisoner cases filed each year are affected by this pleading requirement." BIO at 1. With all due respect to respondents and their able counsel, this argument is nonsensical. In the three circuits that require a prisoner to do so – the Sixth, Tenth, and Eleventh Circuits – a prisoner's failure will result in dismissal. In the seven circuits that reject such a requirement – the First, Second, Third, Fourth, Seventh, Eighth, and Ninth Circuits – a motion to dismiss by prison officials on the basis that the prisoners failed to plead and show exhaustion will be rejected as being foreclosed by binding circuit precedent. Whether a prisoner must plead and show exhaustion in his or her complaint certainly affects every single PLRA complaint filed in the nation's federal courts.

With respect to the second question presented, we conceded in the petition that we know of no statistics indicating the percentage of the over 20,000 prison civil rights suits filed each year that involve that question. *See* Pet. at 10. Nevertheless, we noted that the number must be immense because the question presented is involved in some percentage of the most pervasive type of suit filed in the Nation's federal courts. *See id.* Our research into developments post-dating the filing of this petition confirms our suspicion. In the four months since this petition was filed on October 13, 2005, at least forty-two

district court decisions have passed on the second question presented.[5] *See* App., *infra*, at 1a-3a. Thirty-three of those decisions have applied the "total exhaustion" rule to dismiss the entirety of a prisoner's complaint without leave to amend because the complaint contained at least one unexhausted claim. *See id.* at 1a-2a. Nine of the forty-two district court decisions have refused to apply the "total exhaustion" rule. *See id.* at 2a-3a.

The incredible frequency with which these issues arise and the persistence with which district courts resolve these issues inconsistently confirm that the federal courts are in disarray over how to apply the PLRA to the questions presented. Indeed, aside from the recent challenges to the constitutionality of the federal sentencing guidelines, we can conceive of no other legal issues which have so frequently divided the federal courts. *See Mistretta v. United States*, 488 U.S. 361, 371 (1989) (granting certiorari to resolve "disarray among the Federal District Courts" over the constitutionality of the federal sentencing guidelines); *see also generally United States v. Booker*, 125 S. Ct. 738 (2005) (similar). This Court's resolution of these divisions is most urgently needed.

Even if the issues did not recur with such great frequency, this Court's intervention would still be warranted because of the importance of the issues at stake. As explained by *amici*, "[p]risoners have a constitutional right of access to the courts" to obtain relief on complaints related to imprisonment. *Amici* Br. at 3 (quoting *Bounds v. Smith*, 430 U.S. 817, 821 (1977)). One of the vehicles through which they may exercise this right is a federal civil rights action. *See Muhammad v. Close*, 540 U.S. 749, 750 (2004)

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[5] We include in an Appendix to this reply brief a list of citations to district court decisions that have passed on the "total exhaustion" issue. We emphasize that our numbers are necessarily under-inclusive. Although most of the cases cited in the Appendix are unreported decisions that are nonetheless available on Westlaw, most district court decisions are never released to Westlaw. A quick survey of the cases cited in the Appendix confirms this fact, as the overwhelming majority of the decisions cited in the Appendix come from the Western District of Michigan.

The abundance of cases from the Western District of Michigan – which is within the Sixth Circuit and must apply its law – also explains why, notwithstanding that the Sixth Circuit's interpretation of the "total exhaustion" issue falls on the minority side of the circuit splits, we have found so many more district court decisions consistent with the Sixth Circuit's interpretation. Because the Sixth Circuit falls on the minority side of the split over this issue, we suspect that, if all of the Nation's district court decisions were available on Westlaw, a majority of district court decisions would reject the Sixth Circuit's view.

(per curiam). In the decision below, the court of appeals imposed "judicially-created impediments [that] have transformed the constitutional right of access to the courts into a complicated maze of traps for prisoners who seek to vindicate their rights." *Amici* Br. at 7. And, as we explain *infra* at pp. 7-15, these judicially-imposed impediments find no support in the PLRA's text, structure, or underlying policy goals.

Respondents assert that the dismissal without prejudice that results from the application of these judicially-imposed impediments "obviously [do] not prejudice[]" prisoners because they "can bring their action again," BIO at 1, and because any statute of limitations "is tolled while the inmate exhausts administrative remedies [and] from the date of service on the defendant, until the dismissal without prejudice," BIO at 8. Respondents' assertion assumes too much. It is by no means certain that the statute of limitations will be tolled during exhaustion absent an applicable tolling rule in the forum state.[6] And at least one court has held that "the pendency of a grievance • • • does not toll the running of the limitations periods." *Thomas v. Henry*, No. 02 CIV.2584 SJR DFE, 2002 WL 922388, *2 (S.D.N.Y. May 7, 2002) (quoting *Delaware State College v. Ricks*, 449 U.S. 250, 261 (1980)). Nor is it clear that the time that a PLRA case is pending in federal court will toll the statute of limitations.[7] Indeed, one court of appeals decision has held that it will not. *See Long v. Simmons*, 77 F.3d 878, 880 (CA5 1996) (holding that dismissal without prejudice after limitations period expired operated as dismissal *with* prejudice). Additionally, even if a prisoner's case is not time-barred, many will still be precluded or

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[6] For example, in *Brown v. Morgan*, 209 F.3d 595 (CA6 2000) – the case relied on by respondents for the proposition that the limitations period will always be tolled during exhaustion, *see* BIO at 8 n.26 – the court, without any analysis, simply cited to *Harris v. Hegmann*, 198 F.3d 153 (CA5 1999), which relied explicitly on state tolling law. *Brown*, 209 F.3d at 596 (citing *Harris*, 198 F.3d at 157-58). Subsequent decisions have relied on or at least cited state law. *See Johnson v. Rivera*, 272 F.3d 519, 521 (CA7 2001); *Leal v. Georgia Dep't of Corr.*, 254 F.3d 1276, 1280 (CA11 2001) (assuming that state law provides the tolling rule); *Wisenbaker v. Farwell*, 341 F. Supp. 2d 1160, 1164-65 (D. Nev. 2004) (applying "best judgment" about application of state equitable tolling law); *Howard v. Mendez*, 304 F. Supp. 2d 632, 636 (M.D. Pa. 2004) (applying state tolling rules to a case involving a federal prisoner); *McCoy v. Goord*, 255 F. Supp. 2d 233, 253 (S.D.N.Y. 2003) (noting in dictum that time spent exhausting appears to be tolled under New York law); *Roberts v. Saunders*, No. Civ.A.7:02-CV-00808, 2003 WL 23678921, *1 (W.D. Va. Jan. 10, 2003).

[7] To this end, it is no surprise that respondents do not cite a single authority for their assertion that the limitations period will be tolled while a prisoner's PLRA case is pending in federal court.

deterred from refiling their properly exhausted claims because "re-filing an action would require an additional filing fee," *Jones Bey*, 407 F.3d at 808, and for those prisoners no longer eligible for *in forma pauperis* status by operation of the PLRA's "three strikes" provision, the entire filing fee would be due at the inception of their re-filed action.[8] Many prisoners – like petitioner, *see* Pet'r IFP Application – are unable to pay an additional filing fee up front and, consequently, will be out of court while their claims become stale. "[I]mposition of such barriers with regard to properly brought claims * * * risk * * * precluding meritorious, fully exhausted claims," *Lira*, 427 F.3d at 1175, in violation of prisoners' "constitutional right of access to the courts," *Bounds*, 430 U.S. at 821.

Ensuring that prisoners' constitutional right of access to the courts is not unnecessarily impeded – particularly in light of the courts of appeals' disagreements over the propriety of such impediments – is a compelling reason for this Court to grant certiorari. When coupled with the frequency with which questions over these impediments recur, the need for this Court's intervention becomes dire.

C. This Petition Is An Appropriate Vehicle to Decide the Questions Presented

Respondents do not dispute that this Petition is an appropriate vehicle to decide the questions presented.[9] Indeed, respondents would be hard-pressed to do so because resolution of the questions in petitioner's favor would revive his claims against respondents Morrison and Opanasenko and require the court of appeals to evaluate his challenges to the district court's dismissal of his claims against respondents Bock and Chaplin and defendants Konkle and Aldabaugh for failure to state a claim. *See* Pet. at 15-16.

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[8] "'Strikes' are prior cases or appeals, brought while the plaintiff was a prisoner, which were dismissed 'on the ground that [they were] frivolous, malicious, or fail[ ] to state a claim. * * * Pursuant to § 1915(g), a prisoner with three strikes or more cannot proceed'" *in forma pauperis*. *Andrews v. King*, 398 F.3d 1113, 1116 n. 1 (CA9 2005).

[9] Additionally, we note that, since the petition was filed, this Court granted certiorari in *Woodford v. Ngo*, 126 S. Ct. 647 (2005) (No. 05-416). As we explained in our supplemental brief, the question presented in *Ngo*, which has nothing to do with how PLRA complaints must be pleaded or whether unexhausted claims may be joined in a single action with exhausted claims, will not resolve the issues presented in this case. *See* Supp. Br. at 3 n.2.

Additionally, it is of no moment that the court of appeals' decision below was unpublished and relied on prior circuit precedent because "[t]his Court 'reviews judgments, not statements in opinions.'" *California v. Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (quoting *Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956)). This Court has frequently granted review of unpublished decisions, and those cases frequently involve situations, such as the situations here, where a court of appeals applied prior circuit precedent in an unpublished decision. *See, e.g., MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218 (1994) (granting review of short unpublished *per curiam* order holding that prior circuit precedent "conclusively" determined the outcome of the case).

Further underscoring the notion that the court of appeals' decision to not publish the decision below is irrelevant to this petition's suitability for review is the fact that district courts within the Sixth Circuit have repeatedly relied on the decision below for its precedential value, even though it was unpublished.[10]

D. The Decision of the Court of Appeals Cannot Be Reconciled with This Court's Decisions or the PLRA's Statutory Text, Structure or Underlying Policy Goals

Respondents' primary opposition to the petition is its argument that the court of appeals correctly decided the case below. Neither of the court of appeals' holdings can be reconciled with this Court's decisions or the PLRA's statutory text, structure, or underlying policy goals.

1. The Sixth Circuit's "Plead and Show Exhaustion" Rule Is Contrary to This Court's Prior Decisions, Federal Rule of Civil Procedure 8(a), and the PLRA's Statutory Text

As *amici* have persuasively demonstrated, the heightened pleading standard applied by the court of appeals to justify dismissal of petitioners' complaint "is irreconcilable with this Court's decisions that

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[10] *See Stanley v. Samuels*, No. Civ.A. 05CV477KKC, 2006 WL 269943, *6 (E.D. Ky. Feb. 2, 2006); *Stubbs v. Nalley*, No. Civ.A.6:05-567-DCR, 2006 WL 197055, *3 (E.D. Ky. Jan. 20, 2006); *Marsh v. Price*, No. Civ.A. 05-CV-277-JMH, 2005 WL 3118121,*5 (E.D. Ky. Nov. 21, 2005); *Gross v. Clay County Fiscal Court*, No. Civ.04-505-JBJ, 2005 WL 236526, *3 (E.D. Ky. Sep. 26, 2005); *White v. Harris*, No. Civ 04-265-KKC, 2005 WL 2266658, *2 (E.D. Ky. Sep. 16, 2005); *Wilson v. Wilson*, No. Civ.A. 6:05-200-DCR, 2005 WL 2043064, *4 (E.D. Ky. Aug. 24, 2005); *Chaney v. Catron*, No. Civ.A. 605324-DCR, 2005 WL 1801711, *3 (E.D. Ky. July 25, 2005).

Unlike some other circuits, the Sixth Circuit allows its district courts and litigants to cite to unpublished decisions as precedent. *Compare* CA6 R. 28(g) *with, e.g.*, CA9 R. 36-3.

prohibit judicially-created pleading requirements * * * and [Federal] Rule [of Civil Procedure] 8(a)'s liberal notice pleading standard." *Amici* Br. at 9-14 (discussing Fed. R. Civ. P. 8(a), *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993), and *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002)). Respondents' primary response is the bold argument that the PLRA's pre-service screening provision, 28 U.S.C. § 1915A, conflicts with and, therefore, impliedly repealed and supercedes Federal Rules of Civil Procedure 8 and 15 with respect to prison civil rights complaints. *See* BIO at 2-8. In doing so, they recognize – as they must – that "[i]t is * * * a cardinal rule of statutory construction that repeals by implication are not favored * * * [and that] the intention of the legislature to repeal must be clear and manifest." BIO at 4-5 (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976)). "Where there is no clear intention" to repeal or supercede, one statute will not be given priority over another statute or Rule, "regardless of the priority of enactment." *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974). Critically, respondents have not shown – indeed, cannot show – that § 1915A's statutory text, operation, or legislative history evidence a "clear intention" to repeal or supercede Rules 8 and 15.

This Court has acknowledged "two well-settled categories of repeals by implication." *Kremer v. Chemical Constr. Co.*, 456 U.S. 461, 468 (1982) (quoting *Radzanower*, 426 U.S. at 154). "An implied repeal will only be found [1] where provisions in two statutes are in irreconcilable conflict, or [2] where the latter Act covers the whole subject of the earlier one and is clearly intended as a substitute." *Branch v. Smith*, 538 U.S. 254, 273 (2003) (plurality opinion) (internal quotation marks and citations omitted). Section 1915A and Rules 8 and 15 are not in "irreconcilable conflict." *Id.*

> It is not enough to show that the two statutes produce differing results when applied to the same factual situation, for that no more than states the problem. Rather, "when two statutes are capable of co-existence, it is the duty of the courts * * * to regard each as effective." * * * "Repeal is to be regarded as implied only if necessary to make the (later enacted law) work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes."

Radzanower, 426 U.S. at 155 (quoting *Morton*, 417 U.S. at 551; *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963)).

Here, the basic purposes of the PLRA and its screening provision can be fairly served by giving full effect to Rules 8 and 15. The PLRA's screening provision, as its text states, is designed to allow prompt dismissal of a suit that is "frivolous, malicious, * * * fails to state a claim upon which relief may be granted; or * * * seeks monetary relief from a defendant who is immune from such relief." 28 U.S.C. § 1915A. These considerations necessarily go to the *merits* of a claim as pleaded by the prisoner plaintiff. Nowhere does § 1915A or its legislative history indicate that district courts are supposed to pre-screen and dismiss for failure to exhaust administrative remedies. Indeed, PLRA § 1997e(c), the provisions of which govern both early dismissal and exhaustion of administrative remedies, expressly distinguishes the § 1915A early dismissal grounds from dismissal for failure to exhaust administrative remedies. *See* 42 U.S.C. § 1997e(c)(2) ("In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim *without first requiring the exhaustion of administrative remedies*." (emphasis added)).

There is no conflict between § 1915A and Rule 8 and 15 because, when § 1915A is properly read, all it requires is that a prisoner plaintiff plead "a short and plain statement," Fed. R. Civ. P. 8(a), establishing that his or her claim is not "frivolous, malicious, * * * fails to state a claim upon which relief may be granted; or * * * seeks monetary relief from a defendant who is immune from such relief," 28 U.S.C. § 1915A. Nor is there any conflict between § 1915A and Rule 15 because, when § 1915A is properly read, "leave [to amend] shall be freely given," Fed. R. Civ. P. 15(a), when the prisoner plaintiff's claims are not "frivolous, malicious, * * * fails to state a claim upon which relief may be granted; or * * * seeks monetary relief from a defendant who is immune from such relief," 28 U.S.C. § 1915A. Since it is possible for § 1915A and Rules 8 and 15 "to coexist in this manner," – indeed, the

majority of circuits have found no irreconcilable conflict between § 1915A and Rules 8 and 15, *see* Pet. at 13-14 – "they are not so repugnant to each other to justify a finding of an implied repeal by this Court." *Radzanower*, 426 U.S. at 156-57; *see also Kremer*, 456 U.S. at 471 ("Since an implied repeal must ordinarily be evident from the language or operation of a statute, the lack of such manifest incompatibility between [two provisions in apparent tension] is enough to end [this Court's] inquiry.").

Nor does Congress' enactment of § 1915A fall within the second category of repeals by implication because § 1915A does not "cover[] the whole subject of," *Radzanower*, 426 U.S. at 157, federal pleading procedure. Perhaps even more importantly, respondents' repeal by implication argument must fail because respondents do not establish, under either test, that Congress "clear[ly] and manifest[ly]" intended to repeal Rules 8 and 15's applicability to PLRA suits. Neither the PLRA itself nor its legislative history indicates an intent – much less, even mentions – Rule 8 or Rule 15.

Once respondents' bold repeal by implication argument is properly rejected – as it must be – it becomes evident that, by requiring prisoner plaintiffs to plead and show exhaustion with their initial federal complaint, the court of appeals improperly ignored *Leatherman*'s and *Swierkiewicz*'s holdings that "Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions" not applicable here. *Swierkiewicz*, 534 U.S. at 513 (referring to *Leatherman*).[11]

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[11] Respondents attempt to distinguish *Swierkiewicz* on the basis that it was an employment discrimination case in which the court of appeals required the plaintiff to plead facts establishing a prima facie case of discrimination under the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), framework. *See* BIO at 6. Respondents argue that, unlike the *McDonnel Douglas* framework, the PLRA requires prisoner plaintiffs to plead exhaustion. *See* BIO at 6-7. This attempt to distinguish *Swierkiewicz* founders on its premise. As shown elsewhere in this reply brief, *supra* at p. 9 & *infra* at p. 11, the PLRA does not require prisoner plaintiffs to plead exhaustion. *See, e.g.*, 42 U.S.C. § 1997e(c)(2) ("In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim *without first requiring the exhaustion of administrative remedies*." (emphasis added)).

2. The Sixth Circuit's "Total Exhaustion Rule" Is Inconsistent with the PLRA's Statutory Text, Structure, and Underlying Policy Goals

Respondents assert that the court of appeals' "total exhaustion rule" "is consistent with the text of the statute." BIO at 10. In doing so, they argue that, because the PLRA's exhaustion provision, 42 U.S.C. § 1997e(a), states that no "action" shall be brought in federal court until administrative remedies have been exhausted, but the subsection prescribing rules for dismissal refers to "actions" or "claims," *id.* § 1997e(c)(1) & (2), Congress intended that prisoners exhaust administrative remedies on all claims before commencing an action. *See* BIO at 10-11. Contrary to respondents' argument and the court of appeals' holding below, in three respects, § 1997e(c) indicates that district courts need not dismiss an entire action without leave to amend because of the presence of one unexhausted claim.

First, in § 1997e(c), Congress ordered dismissal of *certain* defective suits and claims – namely, those that are "frivolous, malicious, fail[] to state a claim upon which relief can be granted, or seek[] monetary relief from a defendant who is immune from such relief," 42 U.S.C. § 1997e(c)(1), "but *did not* include mixed actions among those actions that must be dismissed. *Lira*, 427 F.3d at 1171 (emphasis added); *see also Ortiz*, 380 F.3d at 657 ("Section 1997e(c) * * * the place where we would expect to find guidance as to whether dismissal of 'mixed actions' is required[,] is silent on the issue."). This omission establishes that "no special rule regarding the treatment of mixed complaints was intended." *Lira*, 427 F.3d at 1172.

Second, § 1997e(c)(2)'s reference to dismissal of a "claim" for failure to exhaust, juxtaposed to § 1997e(c)(1)'s reference to dismissal of an "action," "indicates that unexhausted claims can be treated independently, for dismissal purposes, from the action as a whole. *Id.* Indeed, "[t]here would be little point in providing for the dismissal of some nonexhausted claims on the merits if the remainder of the action would then have to be dismissed, although exhausted, because of the failure to exhaust the dismissed claims." *Id.*

Third, interpreting the word "action" in § 1997e(a) and (c)(1) to indicate that an exhaustion defect in any claim infects the suit as a whole "would 'render[] subsection (c)(2) superfluous.'" *Id.* (quoting *Jones Bey*, 407 F.3d at 811 (Clay, J., concurring in part and dissenting in part)). If § 1997e(a) demands a "total exhaustion" dismissal rule because it uses the word "action," then § 1997e(c)(1), because it uses the word "action," must also require dismissal of the entire case if any claim is "frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief." "Yet, § 1997e(c)(1) must apply only when *all* the claims meet the statutory standard for summary dismissal on the merits, not when only some of them do." *Id.*; *see also Jones Bey*, 407 F.3d at 811 (Clay, J., concurring in part and dissenting in part). Otherwise, § 1997e(c)(2), which contemplates the dismissal of individual frivolous "claims," would be "unnecessary." *Lira*, 427 F.3d at 1172. In other words, "the inclusion of a single frivolous claim would contaminate the entire action, mandating dismissal under § 1997e(c)(1)." *Id.* To read § 1997e(c)(1)'s use of the word "action" as precluding dismissal of individual defective claims would therefore clash with the "rule against superfluities" in statutory construction. *Hibbs v. Winn*, 542 U.S. 88, 101 (2004).

In sum, the use of the term "action" elsewhere in the PLRA does not support interpreting § 1997e(a) as dictating a "total exhaustion" dismissal rule. "To the contrary, while 'action' in the PLRA refers to the case as a whole, the statute consistently uses the term in a manner that contemplates dismissing the entire action only if the entire action fails to meet statutory standards." *Lira*, 427 F.3d at 1173. When some claims are valid and others are not, the usual procedural norm – that when a complaint has both good and bad claims, only the bad claims are dismissed – should prevail.

Respondents assert that "requiring total exhaustion is consistent with this Court's habeas corpus jurisprudence." BIO at 11. Drawing a parallel between the PLRA and habeas corpus law is unnecessary because, when the PLRA's text and structure are properly considered, there is no need to analogize to habeas corpus jurisprudence. *See Lira*, 427 F.3d at 1173. This Court's decision mandating "total

exhaustion" in the habeas context – *Rose* v. *Lundy*, 455 U.S. 509 (1982) – did so exclusively for policy reasons because the applicable habeas statute was uninformative. *See id.* at 516-17 (analyzing the "policies underlying the statutory provision to determine its proper scope" when the text found to be ambiguous). But where the statutory language and structure answer an interpretation question, resorting to policy evaluation is inappropriate. *See Alexander* v. *Sandoval*, 532 U.S. 275, 286-87 (2001) (noting that "[s]tatutory intent * * * is determinative" and that it will not be disregarded "no matter how desirable that might be as a policy matter"). Moreover, even if this Court were to consider its habeas jurisprudence, it would be unhelpful. First, *Rose* does not require dismissal of an entire habeas action without leave to amend, as the court of appeals in these PLRA cases did. *Rose* expressly held that a habeas petitioner "can always amend the petition to delete unexhausted claims." *Rose*, 455 U.S. at 520. Additionally, this Court's decision in *Rhines* v. *Weber*, 125 S. Ct. 1528 (2005), modified the *Rose* rule to allow district courts to stay habeas petitions containing both exhausted and unexhausted claims to allow petitioners to exhaust their unexhausted claims in state court without having to re-file and face a possible statute of limitations bar. *See id.* at 1535. Thus, respondents' habeas analogy "does not support the inflexible total exhaustion-dismissal rule" that the court of appeals applied. *Lira*, 427 F.3d at 1173 n.10.

Respondents also assert that "the total exhaustion rule is consistent with the overall policy of the PLRA." BIO at 11. Even if this Court were to take policy considerations into account – which it should not – such considerations support *rejection* – rather than endorsement – of the Sixth Circuit's "total exhaustion" rule. As this Court identified, and as respondents properly note, *see* BIO at 11, "Congress enacted [PLRA] § 1997e(a) to reduce the quantity and improve the quality of prisoner suits" by filtering out frivolous claims, satisfying some grievances, and developing an administrative record for use in cases that go forward. *Porter* v. *Nussle*, 534 U.S. 516, 524 (2002). Respondents argue that the Sixth Circuit's "total exhaustion" rule satisfies this policy objective in three ways, none of which are persuasive.

First, respondents argue that "[a]bsent total exhaustion the courts will be mired in the screening process, sorting through piles of documents, trying to determine whether the inmate exhausted his claim in all steps of the grievance process." BIO at 12. This argument founders on its premise. District courts are not required under the PLRA to screen prisoner complaints for non-exhaustion. Indeed, as noted above, *supra* at pp. 9 & 11, the PLRA's pre-screening provision allows a district court to dismiss a prisoner's civil rights complaint only "if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief." 42 U.S.C. § 1997e(c)(1). Nowhere in the PLRA did Congress specify that a court may dismiss a PLRA claim for failure to properly exhaust.

Second, respondents argue that the "total exhaustion rule avoids piecemeal litigation." BIO at 13. This argument ignores the reality that some "prisoner[s] who ha[ve] filed an improper mixed complaint can * * * refile, including only the properly exhausted claims, while exhausting the remaining claims and filing another suit later."[12] *Lira*, 427 F.3d at 1174 (citing *Jones Bey*, 407 F.3d at 811-12 (Clay, J., concurring in part and dissenting in part); *Ortiz*, 380 F.3d at 658). This would promote the precise inefficiency and waste of judicial resources – namely, requiring district courts to docket, assign, and process two cases where one would suffice – that the PLRA was designed to prevent. *See id.*

Finally, respondents argue that "the total exhaustion rule * * * encourag[es] prisoners and prison officials to make full use of the prison grievance procedure * * * aids the Federal courts by ensuring that there is a full administrative record to review for each of the prisoner's claims." BIO at 13-14.

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[12] Unlike habeas corpus cases, *see* 28 U.S.C. § 2244(b); *see also Mayle v. Felix*, 125 S. Ct. 2562, 2570 (2005) (recognizing that "federal habeas claims, by their very nature, challenge the constitutionality of a [single] conviction or sentence"), there is no preclusion to filing more than one PLRA suit. Additionally, PLRA claims joined into a single action may concern entirely independent underlying factual bases – as is the case with petitioner Williams' complaint – such that ordinary claim preclusion doctrines would not bar a subsequent suit. "Which claims are joined in a given PLRA lawsuit * * * is entirely up to the plaintiff. As a result, the goal of avoiding piecemeal litigation is far less achievable than in the habeas context, where a single conviction is at issue and severe restrictions on second and successive petitions ordinarily require that all challenges to that conviction be joined in a single [habeas] petition." *Lira*, 427 F.3d at 1174 (citing 28 U.S.C. § 2244(b)).

Crucially, however, the "total exhaustion" rule adopted by the Sixth Circuit and urged by respondents here makes little sense in the context of prison condition suits because a PLRA plaintiff's claims may have little to do with each other – temporally or substantively – as is the case here. *See Lira*, 427 F.3d at 1174 ("[E]xhausting one of these causes of action would not help satisfy the plaintiff, weed out frivolous complaints, or develop an administrative record with respect to the other [claims], entirely separate matters."). Moreover, under the Sixth Circuit's "total exhaustion" rule, both petitioner's deliberate indifference and First Amendment retaliation claims were dismissed, even though respondents conceded, *see* Pet. App. at 32a, that petitioner exhausted his retaliation claim against respondent Opanasenko and none of the lower courts found that petitioner actually failed to exhaust his deliberate indifference claims,[13] *see* Pet. at 15-16. Dismissing both sets of petitioner's claims will do nothing to assist the lower courts in addressing them because petitioner's claims were actually exhausted, a full administrative record was developed, and petitioner provided the district court proof of exhaustion with his opposition to respondents' motion to dismiss. *See* Pet. App. at 16a.

CONCLUSION

For the foregoing reasons and those stated in the petition, petitioner's supplemental brief, and the *amici* brief of D.C. Prisoners' Legal Services Project Inc. *et al.*, certiorari should be granted.

Respectfully submitted,

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February 23, 2006

[13] As noted in the petition, *see* Pet. at 15-16, and above, *supra* at p. 6, the district court dismissed petitioner's deliberate indifference claims against respondents Bock and Chaplin and defendants Konkle and Aldabaugh for failure to state a claim and against respondents Morrison and Opanasenko for failure to attach proof of exhaustion to his complaint. *See also* Pet. App. at 5a-6a, 14a.

APPENDIX

A. District Court Cases Applying the "Total Exhaustion" Rule to Dismiss Entire Prisoner Actions – October 13, 2005, to February 16, 2006

Adams v. Paquet, No. 2:05-CV-260, 2005 WL 3371853, *2 (W.D. Mich. Dec. 12, 2005)

Alexander v. Williams, No. 1:05-CV-663, 2005 WL 3072017, *2 (W.D. Mich. Nov. 16, 2005)

Annabel v. Eyke, No. 2:05-CV-209, 2005 WL 2758077, *2 (W.D. Mich. Oct. 25, 2005)

Anthony v. Hill, No. 2:06-CV-9, 2006 WL 357792, *2 (W.D. Mich. Feb. 15, 2006)

Baggett v. Smith, No. 1:05-CV-804, 2006 WL 13023, *2 (W.D. Mich. Jan 3, 2006)

Bentley v. Beckstrom, No. Civ.A. 06CV07HRW, 2006 WL 149016, *2 (E.D. Ky. Jan. 18, 2006);

Brintley v. Corrections Medical Services, No. 02-CV-11, 2006 WL 357794, *2 (W.D. Mich. Feb. 15, 2006)

Briscoe v. Anderson, No. 1:05CV2429, 2006 WL 144115, *3 (N.D. Ohio Jan.17, 2006)

Campbell v. Trevino, No. 1:05-CV-748, 2006 WL 357050, *2 (W.D. Mich. Feb. 15, 2006)

Colston v. Lindsey, No. 2:05-CV-282, No. 2006 WL 335669, *2 (W.D. Mich. Feb. 13, 2006)

Courtney v. Caruso, No. 4:05-CV-83, 2005 WL 2671283, *2 (W.D. Mich. Oct. 19, 2005)

Daily v. Blackford, No. 2:05-CV-253, 2006 WL 15429,*2 (W.D. Mich. Jan. 4, 2006)

Diaz v. Rutter, No. 2:05-CV-239, 2005 WL 3262440, *4 (W.D. Mich. Nov. 30, 2005)

Duerson v. Henderson County Det. Ctr., No. Civ.A. 405CVP165M, 2005 WL 3134049, *2 (W.D. Ky. Nov. 23, 2005)

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El-Shabazz v. Dunn, No. 2:05-CV-17, 2006 WL 335659, *4 (W.D. Mich. Feb. 13, 2006)

Grasty v. Samuels, No. Civ.A. 05CV484KKC, 2005 WL 2708410, *2-*3 (E.D. Ky. Oct. 21, 2005)

Harnage v. Swanson, No. 05-3098-JTM, 2006 WL 269974, *11 (D. Kan. Feb. 3, 2006)

Harris v. Edlund, No. 2:05-CV-270, 2006 WL 250699, *1-*2 (W.D. Mich. Feb 1, 2006)

Harris v. Healy, No. 2:05-CV-247, 2006 WL 250628, *2 (W.D. Mich. Feb. 1, 2006)

Harris v. Hoover, No. 2:05-CV-269, 2006 WL 15404, *2 (W.D. Mich. Jan. 4, 2006)

Jennings v. Bergh, No. 2:06-CV-1, 2006 WL 357666, *1 (W.D. Mich. Feb. 15, 2006)

Kitchen-Bey v. Michigan Dep't of Corr., No. 2:05 CV 267, 2006 WL 62827, *3 (W.D. Mich. Jan. 10, 2006)

McKaye v. Naples, No. 2:05-CV-244, 2005 WL 3262443, *2 (W.D. Mich. Dec. 1, 2005)

Owens v. Simon, No. 1:05-CV-733, *3 2005 WL 3107732, *3 (W.D. Mich. Nov. 21, 2005)

Payne v. Hofbauer, No. 2:05-CV-245, 2005 WL 3371443, *1 (W.D. Mich. Dec. 12, 2005)

Rand v. Antonini, No. Civ.A. 05-CV-70969, 2005 WL 3163390, *1, *3-*4 (E.D. Mich. Nov. 28, 2005)

Rector v. Morgan, No. 3:05-CV-192, 2005 WL 3465680, *1-*2 (E.D. Tenn. Dec. 19, 2005)

Reynolds v. Harris-Spicer, No. 1:05-CV-527, 2005 WL 2990486, *4 (W.D. Mich. Nov. 8, 2005)

Schultz v. Frontera, No. 2:05-CV-258, 2005 WL 3454695, *3 (W.D. Mich. Dec. 16, 2005)

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B. District Court Cases Refusing to Apply the "Total Exhaustion" Rule to Dismiss Entire Prisoner Actions – October 13, 2005, to February 16, 2006

Beltran v. O'Mara, 405 F. Supp. 2d 140, 157-59 (D.N.H. 2005)

Burgess v. Pliler, No. S-03-0643 GEB GGH P, 2006 WL 278588, *7 (E.D. Cal. Feb. 3, 2006)

Campbell v. Chaves, 402 F. Supp. 2d 1101, 1108-09 (D. Ariz. 2005)

Copenhaver v. Hammer, No. 1:05-CV-675, 2005 WL 2899673, *3 (W.D. Mich. Nov. 3, 2005)

Mullicane v. Marshall, No. F 03 6299 AWILJO P, 2005 WL 3299079, *2 (E.D. Cal. Dec. 1, 2005)

Porter v. Caruso, No. 1:05-CV-562, 2005 WL 2679785, *3-*4 (W.D. Mich. Oct. 20, 2005)

Shabazz v. Martin, No. 00CV73005DT, 2006 WL 305673, *2-*3 (E.D. Mich. Feb. 9, 2006)

Shavers v. McKee, No. 1:06 CV 40, 2006 WL 322482, *3 (W.D. Mich. Feb. 10, 2006)

Wappler v. Brevard, No. 4:05-CV-90, 2005 WL 2671278, *3-*4 (W.D. Mich. Oct. 19, 2005)

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141 Cong. Rec. S14627 (daily ed. Sept. 29, 1995) .

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in Support of the Petitioners, *Woodford v. Ngo*,
126 S.Ct. 2378 (No. 05-416),
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Litigation Reform Act: The Consequence of
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ORIGINAL

No. 05 - 7058

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ORIGINAL

Lorenzo L. Jones,

Petitioner,

v.

Barbara Bock et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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November 14, 2005

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SUPPLEMENTAL BRIEF
IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 15.8, Petitioner Lorenzo L. Jones submits this supplemental brief in support of his October 13, 2005, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit. *See* Sup. Ct. R. 15.8 ("Any party may file a supplemental brief at any time while a petition for certiorari is pending, calling attention to new cases, new legislation, or other intervening matter not available at the time of the party's last filing."); *see also* Robert L. Stern et al., SUPREME COURT PRACTICE § 6.39, at 463-64 (8th ed. 2002).

As explained in the petition, the federal courts of appeals are intractably and increasingly split over the second question presented:

> Whether the PLRA prescribes a "total exhaustion" rule that requires a federal district court to dismiss a prisoner's federal civil rights complaint for failure to exhaust administrative remedies whenever there is a single unexhausted claim, despite the presence of other exhausted claims.

Pet. at i.

On November 1, 2005 – almost three weeks after the petition was filed – the Ninth Circuit published its decision in *Lira v. Herrera*, No. 02-16325, — F.3d —, 2005 WL 2850115 (CA9 Nov. 1, 2005), which bears directly on this question and widens the split among the circuits. Prior to *Lira*, the Ninth Circuit had not taken a position on whether the PLRA requires dismissal of a "mixed" PLRA complaint in its entirety, and as noted in the petition, the district courts within the Ninth Circuit were sharply divided. Pet. at 23 (cataloguing disagreement among district courts within the Ninth Circuit).

In *Lira*, the Ninth Circuit rejected the total exhaustion rule[1] first articulated by the Tenth Circuit in *Ross v. City of Bernalillo*, 365 F.3d 1181, 1182 (CA10 2004), adopted by the Sixth Circuit in *Jones Bey v. Johnson*, 407 F.3d 801, 809 (CA6 2005) – the prior Sixth Circuit precedent on which the court below relied in this case – and practiced by the Third Circuit in *Vazquez v. Ragonese*, 142 Fed. Appx. 606, 606 (CA3 2005). It then expressly "agree[d], with some caveats, that the Second Circuit's approach [in *Ortiz v. McBride*, 380 F.3d 649, 651 (CA2 2004), *cert. denied*, 125 S. Ct. 1398 (2005),] is appropriate." *Lira*, 2005 WL 2850115 at *5. In doing so, it also aligned itself with the three additional circuits – the Fifth, Seventh, and Eighth Circuits – that practice partial exhaustion. *See Johnson v. Johnson*, 385 F.3d 503, 533 (CA5 2004) (dismissing only unexhausted claims from a mixed PLRA complaint); *Lewis v. Washington*, 300 F.3d 829, 836 (CA7 2003) (affirming dismissal of one claim for failure to exhaust but remanding for determination of whether other claim was exhausted); *Kozohorsky v. Harman*, 332 F.3d 1141, 1144 (CA8 2003) (requiring district courts to allow PLRA plaintiffs to amend their complaints to delete any unexhausted claims).

As *Lira* and the split that it widens illustrate, clarification of the meaning of the PLRA's exhaustion requirement is of substantial public importance. And, as a coalition of twenty-two states – including the State of Michigan – and the District of Columbia recently acknowledged in another PLRA exhaustion case, "the substantial public importance of clarifying the meaning of the PLRA's exhaustion requirement" "makes this petition cert-worthy." Brief of the States of

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[1] Rather than employ the term "total exhaustion" as used by every other case presenting this issue and as used throughout the petition, *Lira* "use[s] the term 'total exhaustion dismissal.'" 2005 WL 2850115. The distinction is purely semantic.

New York et al. as *Amici Curiae*, *Woodford v. Ngo*, No. 05-416, at 3-4.[2]

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 14, 2005

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[2] At issue in *Ngo* is whether "a prisoner satisf[ies] the Prison Reform Litigation Act's administrative-exhaustion requirement by filing an untimely or procedurally defective administrative appeal." Petition for Certiorari, *Woodford v.Ngo*, No. 05-416, at i. The same issue is also presented in *Johnson v. Meadows*, 418 F.3d 1152 (CA11 2005), *pet. for cert. filed* Sep. 8, 2005 (No. 05-6336), and *Feuer v. McCollum*, 139 Fed. Appx. 928 (CA10 2005), *pet. for cert. filed* Nov. 10, 2005 (not yet docketed).

While as important and as worthy of this Court's consideration, the question presented in *Ngo*, *Johnson*, and *Feuer*, will not resolve the issues presented in this case.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2005

No. 05-7058

LORENZO L. JONES, PETITIONER

v.

BARBARA BOCK ET AL., RESPONDENTS

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I, Jean-Claude André, a member of the Bar of this Court, hereby certify that on November 14, 2005, as required by Supreme Court Rule 29, the enclosed SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI was served by first-class mail, postage prepaid, on counsel for Respondents:

Thomas L. Casey, Michigan Solicitor General
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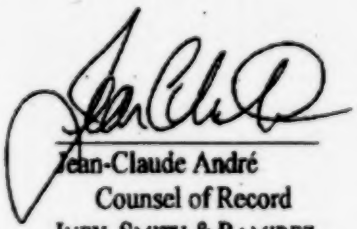
I further certify that all parties required to be served have been served.



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NOV 17 2005

No. 05-7058

IN THE

Supreme Court of the United States

LORENZO L. JONES,

Petitioner,

v.

BARBARA BOCK ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF D.C. PRISONERS' LEGAL SERVICES PROJECT INC., LEGAL AID SOCIETY OF THE CITY OF NEW YORK, OHIO JUSTICE AND POLICY CENTER, PRISON LEGAL NEWS, AND UPTOWN PEOPLE'S LAW CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the Prison Litigation Reform Act of 1995 ("PLRA") mandates the dismissal of a prisoner's federal civil rights lawsuit, without leave to amend, in the event that the prisoner's complaint does not describe with particularity how the prisoner exhausted his or her administrative remedies; or instead, whether non-exhaustion is an affirmative defense.

2. Whether the PLRA provides a "total exhaustion" rule, which requires the dismissal, without leave to amend, of a prisoner's entire federal civil rights complaint—including causes of action that have been administratively exhausted—for failure to plead exhaustion with respect to any one or more causes of action.

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INTEREST OF *AMICI*[1]

Amici are five non-profit public interest and legal services organizations that focus on protecting the constitutional and fundamental rights of individuals incarcerated in American prisons, including protecting prisoners' right of access to the federal courts to redress civil rights violations.

D.C. Prisoners' Legal Services Project, Inc. (the "Project") is a non-profit law firm dedicated to ensuring the humane treatment and protecting the dignity of all persons convicted of or charged with a criminal offense under the laws of the District of Columbia and housed in prisons, jails, or community corrections programs. The Project files both individual and class action suits to protect the rights of clients, and seeks to assure that prisoners are afforded access to petition for redress of violations of their constitutional rights.

The **Legal Aid Society of the City of New York** (the "Legal Aid Society") is a private organization that provides free legal assistance to indigent persons in New York City. Its Prisoners' Rights Project represents prisoners in the New York City jails and the New York State prisons in litigation protecting their constitutional and other legal rights, and has litigated a number of cases involving the Prison Litigation Reform Act's administrative exhaustion requirement, which is at issue in this case. *See Ortiz v. McBride*, 380 F.3d 649 (2d Cir. 2004); *Johnson v. Testman*, 380 F.3d 691 (2d Cir.

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[1] The parties have consented to the submission of this brief, and their letters of consent have been filed with the Clerk. Pursuant to this Court's Rule 37.6, *amici* represent that this brief was not written in whole or in part by counsel for any party, and no person or entity other than *amici* or their counsel contributed money or services to the preparation or submission of this brief.

2004); *Mojias v. Johnson*, 351 F.3d 606 (2d Cir. 2003). The Legal Aid Society's Prisoners' Rights Project also has appeared as *amicus* in several prior cases in this Court. *See, e.g., Booth v. Churner*, No. 99-1964, Brief of *Amici Curiae* in Support of Petitioner, 2000 WL 1868111 (Dec. 14, 2000). The Legal Aid Society has an interest in protecting prisoners' individual rights and remedies, as well as its ability to litigate on behalf of its clients, by advocating for appropriate judicial construction of statutes that affect its clients' access to courts.

The **Ohio Justice & Policy Center** (formerly the Prison Reform Advocacy Center) is a public interest, nonprofit law firm dedicated to improving prison conditions and empowering former offenders to become productive members of the community. Established in 1997 and based in Cincinnati, Ohio, the Ohio Justice & Policy Center litigates to enforce constitutional standards regarding medical care, safety and other conditions of confinement, and advises prisoners on how to exhaust their administrative remedies. The Ohio Justice & Policy Center also has worked to educate the Sixth Circuit Court of Appeals about the prison grievance systems that exist in the states comprising the Sixth Circuit. Through its work, the Ohio Justice & Policy Center has emerged as a regional and national expert on various criminal justice issues, prison issues, and prisoners' rights.

Prison Legal News is a non-profit organization that advocates nationally on behalf of those imprisoned in American detention facilities. Prison Legal News publishes a magazine by the same name to educate its readers and the general public about the use of the civil justice system for the vindication of fundamental human and civil rights.

The **Uptown People's Law Center** ("UPLC") is a non-profit legal service center serving the poor and indigent of Chicago. Among other things, the UPLC represents prisoners challenging prison conditions, parole procedures, and "good time policies" in the Illinois prison system. UPLC frequently faces the issue of administrative exhaustion, both in its for-

mal litigation (*see, e.g., Westefer v. Snyder*, 422 F.3d 570 (7th Cir. 2005)), and in addressing the hundreds of letters it receives from unrepresented prisoners seeking advice on how to properly exhaust claims.

STATEMENT

The Prison Litigation Reform Act of 1995, Pub. L. 104-134, 110 Stat. 1321 (1996) ("PLRA"), provides that a prisoner who brings a claim under 42 U.S.C. § 1983 must first exhaust the administrative remedies available in the prison system. This case presents the question whether courts are permitted to impose additional, judicially-created procedural rules governing the manner of pleading administrative exhaustion, where such rules interfere with a prisoner's constitutional right of access to the courts and are not a reasonable means of advancing the congressional policies underlying the PLRA. In this case, the Sixth Circuit joined three other circuits in effectively answering this question in the affirmative, resulting in the dismissal of Petitioner's civil rights claims. Had the alleged deprivation of Petitioner's civil rights occurred in one of the several circuits that have declined to impose these additional procedural rules, Petitioner would have been permitted to present his claims to a federal court. This Court's review is necessary to resolve this deepening split among the circuit courts and to eliminate a lack of uniformity that breeds significant and arbitrary differences nationwide in the vindication of prisoners' rights of access to the courts.

1. "[P]risoners have a constitutional right of access to the courts." *Bounds v. Smith*, 430 U.S. 817, 821 (1977). One of the two principal means for a prisoner to pursue this constitutional right is to file a complaint under the Civil Rights Act of 1871 (as amended, 42 U.S.C. § 1983). *See Muhammad v. Close*, 540 U.S. 749, 750 (2004).

Congress has historically prescribed limits on the ability of a prisoner to pursue a civil rights claim in federal court. Before the passage of the PLRA, a prisoner's right to initiate a civil rights lawsuit in federal court was subject to the provisions of the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 ("CRIPA"). In weighing a prisoner's constitutional right of access to the courts against the provisions of the CRIPA, this Court in 1992 explained: "[t]he first of the principles that necessarily frame our analysis of prisoner's constitutional claims is that federal courts must take cognizance of the valid constitutional claims of prison inmates." *McCarthy v. Madigan*, 503 U.S. 140, 153 (1992).

2. In 1996, Congress passed the PLRA, which included a revised administrative exhaustion provision stating that no action shall be brought by a prisoner under 42 U.S.C. § 1983 with respect to prison conditions "until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). The PLRA did not change the principle that federal courts must take cognizance of the valid constitutional claims of prison inmates. *See United States v. Wells*, 519 U.S. 482, 495 (1997) (stating that the Court "presume[s] that Congress expects its statutes to be read in conformity with th[e] Court's precedents"). Rather, as the legislative history reveals, the purpose of the PLRA was to "prevent[] inmates from abusing the judicial system," 141 Cong. Rec. S14611 (1995) (statement of Sen. Hatch), while still "allow[ing] meritorious claims to be filed." 141 Cong. Rec. S14611 (1995) (statement of Sen. Thurmond).

In *Booth v. Churner*, 532 U.S. 731 (2001), this Court held that the language of 42 U.S.C. § 1997e(a) made it clear that Congress mandated administrative exhaustion regardless of whether the relief sought was injunctive or monetary. *Id.* at 741. The Court later explained in *Porter v. Nussle*, 534 U.S. 516 (2002) that, consistent with the overall purpose of the PLRA, the purpose of the PLRA's administrative exhaus-

tion requirement was "to reduce the quantity and improve the quality of prisoner suits." *Id.* at 524.

3. Since *Booth* and *Porter*, the federal circuits have split over the proper interpretation of the PLRA's exhaustion requirement. The Sixth Circuit and three other circuits have added procedural hurdles that are inconsistent with the manner in which this Court in *Booth* and *Porter* reconciled the PLRA's exhaustion requirement with prisoners' right of access to the courts.

The two judicially-created rules at issue in the Petition are: (i) the requirement that a prisoner's lawsuit be dismissed (without leave to amend) for failure to specifically allege exhaustion of administrative remedies; and (ii) the "total exhaustion" rule, which requires the dismissal (without leave to amend) of a prisoner's entire complaint—including claims that have been administratively exhausted—for failure to plead exhaustion with respect to any one or more claims.

4. Petitioner filed a lawsuit under 42 U.S.C. § 1983. He alleged that he was in a motor vehicle accident while in the custody of the Michigan Department of Corrections ("MDOC"). Pet. App. 1a. Petitioner suffered serious injuries, including spinal cord injuries requiring fusion surgery. *Id.* at 8a. Petitioner alleged that after suffering these injuries, the MDOC was deliberately indifferent to his medical needs; assigned him to work as a "Big Yard Equipment Handler," which further aggravated his injuries; and retaliated against him for complaining about his injuries. *Id.* at 8a-9a.

The district court dismissed Petitioner's entire complaint, and the Sixth Circuit affirmed. Even though Respondents conceded that Petitioner did, in fact, exhaust his administrative remedies with respect to at least one of his claims, the Sixth Circuit held that Petitioner's failure to allege exhaustion in his complaint with sufficient particularity man-

dated dismissal of that claim. *Id.* at 2a. The Sixth Circuit then applied a "total exhaustion" rule and held that "even if [Petitioner] had shown he had exhausted some of his claims, the district court properly dismissed the complaint because [petitioner] did not show that he exhausted all of his claims." *Id.* at 3a.

5. As the Petition demonstrates, the Tenth, Eleventh, and Sixth Circuits impose an additional, judicially-created pleading requirement for a prisoner plaintiff, requiring the dismissal of claims, without leave to amend, for failure to specifically allege exhaustion,[2] while seven circuits—the First, Second, Third, Fourth, Seventh, Eighth, and Ninth Circuits—have declined to impose this requirement. *See* Pet. at 11-15. Three circuits—the Third, Sixth and Tenth—apply a "total exhaustion" rule, requiring the dismissal, without leave to amend, of an entire complaint in the event that one or more of the claims have not been administratively exhausted.[3] *See id.* at 18-20. The Second, Fifth, Seventh and

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2 *See* Pet. at 11-12 *citing, inter alia, Steele v. Federal Bureau of Prisons*, 355 F.3d 1204 (10th Cir. 2003), *cert. denied*, 125 S. Ct. 344 (2004); *Baxter v. Rose*, 305 F.3d 486 (6th Cir. 2002); *Rivera v. Allin*, 144 F.3d 719 (11th Cir.), *cert. dismissed*, 524 U.S. 978 (1998).

3 *See* Pet. at 18-19, *citing, inter alia, Vazquez v. Ragonese*, No. 05-1203, 2005 WL 1842273 (3d Cir. Aug. 4, 2005); *Bey v. Johnson*, 407 F.3d 801 (6th Cir. 2005); *Ross v. County of Bernalillo*, 365 F.3d 1181 (10th Cir. 2004).

Ninth Circuits have rejected the "total exhaustion" rule. *See id.* at 20-22.[4]

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's decision, like the two rulings upon which it is based, cannot be reconciled with this Court's decisions prohibiting judicially created pleading requirements. The Sixth Circuit's decision unnecessarily deprives prisoners of the right to present meritorious civil rights claims in federal court and undermines Congress' purpose in enacting the PLRA. The judicially-created procedural requirements in the Third, Sixth, Tenth and Eleventh Circuits have blocked the constitutional right of access to the courts with a complicated maze of traps for prisoners who seek to vindicate their civil rights.

In requiring a plaintiff prisoner to plead exhaustion of administrative remedies and offer proof of exhaustion in a complaint, or face dismissal without leave to amend, the Sixth Circuit imposed a pleading standard that has no basis in the Federal Rules of Civil Procedure ("Federal Rules") or in the PLRA. The Sixth Circuit's imposition of an affirmative pleading requirement directly conflicts with this Court's rule against judicially-created pleading standards. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993). This conflict is even more pronounced here because many PLRA litigants are *pro se*, and this Court has repeatedly recognized that the pleading standards for *pro se*

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[4] The Ninth Circuit rejected the total exhaustion rule in an opinion issued after the Petition was filed. *Lira v. Herrera*, --- F.3d---, 2005 WL 285015 (9th Cir. Nov. 1, 2005).

litigants are more lenient than the pleading standards for represented parties. *See Castro v. United States*, 540 U.S. 375, 381 (2003); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972). Not only does this additional pleading requirement contradict established law, but it also undermines the PLRA's purpose and unnecessarily prevents prisoners from presenting meritorious civil rights claims in federal courts. The Sixth Circuit's heightened pleading standard is a blunt tool where sharpness is needed: although it may curb frivolous lawsuits, its effect falls equally on meritorious cases as on frivolous ones.

The Sixth Circuit's "total exhaustion" rule is borrowed inappropriately from *Rose v. Lundy*, 455 U.S. 509 (1982), in which this Court adopted such a rule for habeas corpus petitions. The total exhaustion rule in the habeas corpus context furthered the purposes underlying the exhaustion requirement—federal-state comity, and the development of a complete factual record to aid the federal courts. *Id.* at 515, 518-19. Neither rationale supports the adoption of a total exhaustion rule for PLRA cases. *See Wilkinson v. Dotson*, 125 S. Ct. 1242, 1249 (2005) (rejecting argument that permitting prisoner's § 1983 lawsuit without prior exhaustion of state-court remedies would compromise principles of federal-state comity); *Cleavinger v. Saxner*, 474 U.S. 193, 206 (1985) (noting non-judicial nature of prison administrative proceedings).

Further, the total exhaustion rule adopted by the Sixth Circuit is significantly harsher than the habeas rule that is purportedly its model. In *Lundy*, the Court acknowledged that a habeas petitioner should generally be allowed to withdraw unexhausted claims and continue with the exhausted claims, rather than mandating dismissal of the entire petition. *Lundy*, 455 U.S. at 520-21. The Court reaffirmed that view in *Rhines v. Weber*, 125 S.Ct. 1528, 1533 (2005). The *Rhines* Court further noted that Congress had added a statute

of limitations to habeas petitions since *Lundy*, and, in order to avoid forfeiture of meritorious habeas claims, the Court modified the *Lundy* rule to allow courts to stay petitions containing unexhausted claims to permit those claims to be exhausted. *Id.* at 1533-35. Section 1983 actions, too, are governed by statutes of limitations, and the concerns of the *Rhines* Court are equally applicable to such actions.

I. The Court Of Appeals' Judicially-Created Pleading Standard Conflicts With This Court's Prior Decisions And With The Purpose Underlying The PLRA

The circuits are split as to whether prisoner plaintiffs must allege exhaustion of administrative remedies or whether it is an affirmative defense, and further, whether prisoners must plead exhaustion with particularity and with documentary support. *See* Pet. at 11-15. The Sixth Circuit rule is consistent with the rule applied in two other circuits—the Tenth and Eleventh—but inconsistent with the rule applied in seven other circuits—the First, Second, Third, Fourth, Seventh, Eighth, and Ninth. *See* Pet. at 11-15. Not only does the decision below underscore a circuit split, but it contradicts prior decisions of this Court.

1. The decision below is irreconcilable with this Court's decisions that prohibit judicially-created pleading requirements. The Court has held that Rule 8(a)'s liberal notice pleading standard applies to all civil cases, unless the Federal Rules or an Act of Congress expressly provide otherwise. In *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), and *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), the Court prohibited federal courts from imposing pleading standards that are not explicitly authorized by the Federal Rules. With respect to actions governed by the PLRA, neither the Federal Rules nor the PLRA impose any pleading requirement, much

less the heightened pleading standard of the court below. Thus, seven circuits have appropriately held that exhaustion under the PLRA is an affirmative defense to be raised by the defendants, not a pleading requirement. By requiring plaintiff prisoners to satisfy a heightened pleading standard in PLRA actions notwithstanding the lack of statutory authority, the Sixth Circuit disregarded this Court's clear precedent.

In *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, the Court reversed the Fifth Circuit's imposition of a more demanding pleading standard in actions alleging municipal liability under 42 U.S.C. § 1983. *Id.* at 167. The Court explained that while "the Federal Rules do address in Rule 9(b) the question of the need for greater particularity in pleading certain actions, [they] do not include among the enumerated actions any reference to complaints alleging municipal liability under § 1983." *Id.* at 168. As a result, this Court unanimously held that Rule 8(a)'s notice pleading standard alone governs such complaints, and vacated the Fifth Circuit's decision. *Ibid.*

The Court reiterated this rule in *Swierkiewicz v. Sorema N.A.*, in which it also rejected a heightened pleading requirement for employment discrimination complaints brought under Title VII. 534 U.S. at 508. The Second Circuit held that those complaints must contain specific facts establishing a *prima facie* case of discrimination under the framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Swierkiewicz v. Sorema, N.A.*, 5 Fed. Appx. 63, 65 (2d Cir. 2001). This Court reversed the Second Circuit's decision, in part because the judicially-created heightened pleading standard conflicted with Rule 8(a). *Id.* at 512. Referring to *Leatherman*, Justice Thomas wrote for a unanimous Court:

> Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions. Rule

> 9(b), for example, provides for greater particularity in all averments of fraud or mistake. This Court, however, has declined to extend such exceptions to other contexts. . . . Just as Rule 9(b) makes no mention of municipal liability under . . . 42 U.S.C. § 1983, neither does it refer to employment discrimination. Thus, complaints in these cases, as in most others, must satisfy only the simple requirements of Rule 8(a).

Id. at 513 (footnotes omitted). The Court concluded that a requirement of greater specificity for pleading a particular claim could not be judicially created, but would require an amendment to the Federal Rules of Civil Procedure. *Id.* at 515 (citing *Leatherman*, 507 U.S. at 168).

Just as Rule 9(b) makes no mention of municipal liability actions under 42 U.S.C. § 1983 (*Leatherman*) or of employment discrimination actions (*Swierkiewicz*), it makes no mention of actions brought under the PLRA. But despite this Court's clear holdings, the Sixth, Tenth and Eleventh Circuits have imposed a heightened pleading standard in PLRA actions that directly conflicts with this Court's decisions in *Leatherman* and *Swierkiewicz*. In these circuits, plaintiff prisoners bringing PLRA actions must specifically allege that they have exhausted all available state administrative remedies. *See Baxter v. Rose*, 305 F.3d 486, 489-90 (6th Cir. 2002); *Knuckles El v. Toombs*, 215 F.3d 640, 642 (6th Cir. 2000); *Brown v. Toombs*, 139 F.3d 1102, 1104 (6th Cir. 1998); *Steele v. Bureau of Prisons*, 355 F.3d 1204, 1209-10 (10th Cir. 2003); *Rivera v. Allin*, 144 F.3d 719, 731 (11th Cir. 1998). Following Sixth Circuit precedent, the court below affirmed the district court's dismissal of Petitioner's complaint without leave to amend for failure "to comply with the exhaustion requirement." Pet. App. 3a.

The Sixth and Tenth Circuits' attempts at distinguishing this Court's decision in *Swierkiewicz* are unpersuasive. Both courts have asserted that their adopted pleading standard "do[es] not amount to a judicially-created heightened pleading requirement" (*Steele*, 355 F.3d at 1210; *see Baxter*, 305 F.3d at 490), but rather that it is "Congress, not [the] court, [that] has required a prisoner to plead specific exhaustion information." *Steele*, 355 F.3d at 1211.

Congress, however, has not imposed any such pleading requirement. Rather, what Congress has imposed is simply an exhaustion requirement. Section 1997e(a) of the PLRA simply provides that "[n]o action shall be brought . . . until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Similar mandatory language is used in statutes of limitations, for example, but a plaintiff is not required affirmatively to allege that his or her filing falls within the period of an applicable statute of limitations. Rather, a statute of limitations defense is indisputably an affirmative defense under Rule 8(c). *See* Fed. R. Civ. P. 8(c). Thus, imposition of a pleading requirement on the prisoner plaintiff does not necessarily follow from the mandatory language. Absent express congressional instruction, imposition of such a pleading standard contradicts this Court's decision in *Swierkiewicz*. Both the Third and Ninth Circuits have recognized as much. *See Ray v. Kertes*, 285 F.3d 287, 297 (3d Cir. 2002); *Wyatt v. Terhune*, 315 F.3d 1108, 1118 (9th Cir. 2003). In *Wyatt*, for example, the Ninth Circuit opined:

> [A]s the Supreme Court recently affirmed, we will not impose heightened pleading requirements where Congress has not expressly instructed us to do so. *See Swierkiewicz v. Sorema*, 534 U.S. 506 (2002) . . . . We do not discern in § 1997e(a) the kind of express congressional command referred to in *Swierkiewicz* and exemplified by Rule 9(b). Legislatures know how to indicate that exhaustion

> is a pleading requirement when they want to. [Citation.] The PLRA, of course, contains no such command. [Citation.]

315 F.3d at 1118 (citations omitted).

The Sixth, Tenth and Eleventh Circuits' departure from established law is heightened by the additional requirement, imposed by at least two of these circuits, that plaintiff prisoners "attach[] a copy of the applicable administrative dispositions to the complaint, or, in the absence of written documentation, describe with specificity the administrative proceeding and its outcome." *Knuckles El*, 215 F.3d at 642 (citing *Brown*, 139 F.3d at 1104); *see Steele*, 305 F.3d at 1210 (quoting *ibid.*). Here, following *Knuckles El*, the court below affirmed the district court's dismissal of petitioner's complaint because petitioner "neither attached the grievance forms to his complaint nor described the remedies he pursued and the outcome." Pet. App. 2a-3a. Yet nowhere in the Federal Rules or in the PLRA is it contemplated that prisoners be required to attach evidence to their complaints. The requirement, too, amounts to a judicially created pleading hurdle, in contradiction of previous decisions of this Court. *See Leatherman*, 507 U.S. 163; *Swierkiewicz*, 534 U.S. 506; *see also Crawford-El v. Britton*, 523 U.S. 574, 596 (1998) (criticizing "the creation of new rules by federal judges" in the PLRA context).

A heightened pleading standard, when combined with refusal to grant a prisoner leave to amend a complaint, is antithetical to the policy underlying the PLRA. The legislative history of the PLRA vividly illustrates the point that the PLRA was intended to "prevent[]inmates from abusing the judicial system," but was not intended "to prevent inmates from raising legitimate claims." 141 Cong. Rec. S14611 (1995) (statements of Sen. Hatch). While the heightened pleading standard may reduce the total number of prisoner

lawsuits that are adjudicated in federal court, it is no more likely to eliminate frivolous suits than to eliminate meritorious ones.

Because the decision below is based on a heightened pleading standard that contradicts this Court's decisions, will cause the dismissal of meritorious lawsuits, and conflicts with decisions of other circuits, this Court should grant the petition.

II. Importing The "Total Exhaustion" Requirement From Habeas Corpus Jurisprudence Undermines The Purpose Of The PLRA And Prevents Meritorious Suits From Going Forward

The "total exhaustion" rule applied by the court below is based on the inappropriate importation of habeas corpus principles into civil rights litigation. In contrast to the application of the rule in the habeas corpus context, a total exhaustion rule will not advance the purposes underlying the PLRA or its exhaustion requirement. Further, in light of the statute of limitations that applies to § 1983 actions, a total exhaustion rule will operate to bar meritorious claims—even those that have been administratively exhausted.

The circuits are split on the issue of whether the PLRA prescribes a "total exhaustion" rule, requiring a district court to dismiss a prisoner's federal civil rights complaint in its entirety when the complaint contains one or more claims that have not been administratively exhausted—despite the presence of other exhausted claims. The Third, Tenth and Sixth Circuits have adopted a "total exhaustion requirement," and the Second, Fifth, Seventh, and now the Ninth Circuits have rejected this requirement. *See* Pet. at 18-23; *Lira v. Herrera*, —F.3d—, 2005 WL 285015, *9-10 (9th Cir. Nov. 1, 2005).

Circuits adopting a total exhaustion rule have expressly reasoned that this Court's adoption of a total exhaustion rule in the habeas corpus context, *see Rose v. Lundy*, 455 U.S. 509 (1982), justifies the adoption of the same rule in the PLRA context. *See Bey v. Johnson*, 407 F.3d 801, 808 (6th Cir. 2005) ("Because we recognize the correlation between habeas petitions and § 1983 actions, we find it appropriate to interpret the PLRA exhaustion requirement in light of habeas corpus rules."); *Ross v. County of Bernalillo*, 365 F.3d 1181, 1189-90 (10th Cir. 2004) (discussing *Lundy* and adopting the total exhaustion rule in the PLRA context). Both the Second and Ninth Circuits have expressly rejected the importation of the habeas corpus total exhaustion rule into PLRA litigation. *See Lira v. Herrera*, ---F.3d---, 2005 WL 285015, *9-10 (9th Cir. Nov. 1, 2005); *Ortiz v. McBride*, 380 F.3d 649, 660-62 (2d Cir. 2004).

1. The importation of habeas corpus principles into the PLRA based on "the correlation between habeas petitions and § 1983 actions," *see Bey*, 407 F.3d at 808, belies the fact that the distinctions between the two areas of law are important and complex enough to have merited this Court's attention in no less than four opinions over the preceding seven years. *See Wilkinson v. Dotson*, 125 S. Ct. 1242 (2005); *Nelson v. Campbell*, 541 U.S. 637 (2004); *Muhammad v. Close*, 540 U.S. 749 (2004); *Edwards v. Balisok*, 520 U.S. 641 (1997). While the Court has not specifically addressed the exhaustion requirements in these cases, the Court has suggested that the exhaustion requirements for habeas petitions are more stringent than the exhaustion requirements for PLRA actions. *See Muhammad*, 540 U.S. at 751 ("Federal petitions for habeas corpus may be granted only after other avenues of relief have been exhausted. Prisoners suing under § 1983, in contrast, generally face a substantially lower gate, even with the requirement of the Prison Litigation Reform

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Act of 1995 that administrative opportunities be exhausted first.") (citations omitted).

The rationales underlying this Court's adoption of the total exhaustion rule for habeas corpus petitions do not apply to § 1983 actions. In *Lundy*, the Court explained that the policy underlying the exhaustion requirement in habeas corpus law is federal-state comity. *Lundy*, 455 U.S. at 515 ("[A]s a matter of comity, federal courts should not consider a claim in a habeas corpus petition until after the state courts have had an opportunity to act."). The Court reasoned that "a total exhaustion rule promotes comity and does not necessarily impair the prisoner's right to relief." *Id.* at 521. In contrast, the Court has recognized that challenges to the conditions of confinement do not raise the same comity concerns as challenges to the fact or duration of confinement raise. *See Wilkinson v. Dotson*, 125 S. Ct. 1242, 1249 (2005) (rejecting argument that permitting prisoner's § 1983 lawsuit without prior exhaustion of state-court remedies would compromise principles of federal-state comity).

The other rationale for the adoption of the total exhaustion rule in the habeas context was that "federal claims that have been fully exhausted in state courts will more often be accompanied by a complete factual record to aid the federal courts in their review." *Lundy*, 455 U.S. at 518-19. In civil rights cases, there is no analogous requirement that federal courts defer to the findings or legal conclusions of prison grievance administrators. Moreover, this Court has previously noted that prison administrative hearings often will not yield a useful factual record:

> The prisoner was to be afforded neither a lawyer nor an independent nonstaff representative. There was no right to compel the attendance of witnesses or to cross-examine. There was no right to discovery. There was no cognizable burden of

> proof. No verbatim transcript was afforded. Information presented often was hearsay or self-serving. The committee members were not truly independent. In sum, the members had no identification with the judicial process of the kind and depth that has occasioned absolute immunity.

Cleavinger v. Saxner, 474 U.S. 193, 206 (1985). Neither of the rationales underlying a total exhaustion rule in the habeas context applies in the PLRA context.

2. In relying on this Court's reasoning in *Lundy*, and adopting a similar total exhaustion rule for PLRA cases, the Sixth and Tenth Circuits have disregarded another key distinction. Because there was no statute of limitations for the filing of habeas corpus petitions when *Lundy* was decided in 1983, the total exhaustion rule did not threaten to extinguish a prisoner's right to bring a habeas corpus petition. At most, it would *delay* a federal court's adjudication of a prisoner's exhausted claims while the prisoner litigated the unexhausted claims through the state court system (or, alternatively, filed a new federal petition containing only the exhausted claims). In contrast, § 1983 claims are subject to statutes of limitations. *See City of Rancho Palos Verdes, California v. Abrams*, 125 S. Ct. 1453, 1460 n. 5 (2005) ("The statute of limitations for a § 1983 claim is generally the applicable state-law period for personal-injury torts."). Thus, the dismissal of an exhausted § 1983 claim, simply because it is presented along with an unexhausted claim, could effectively *bar* a meritorious civil rights claim forever.

The significance of a statute of limitations to the analysis of the total exhaustion rule, though lost on the Sixth and Tenth Circuits, has not been lost on this Court. In 1996, thirteen years after *Lundy* was decided, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996, which imposed a one-year statute of limitations for federal habeas

petitions (which is tolled during the pendency of a state habeas petition). In *Rhines v. Weber*, 125 S. Ct. 1528 (2005), the Court examined the habeas "total exhaustion" requirement for the first time since the passage of the AEDPA. The Court expressly noted the effect of a statute of limitations on the total exhaustion rule:

> As a result of the interplay between AEDPA's 1-year statute of limitations and *Lundy*'s dismissal requirement, petitioners who come to federal court with 'mixed' petitions run the risk of forever losing their opportunity for any federal review of their unexhausted claims.

Id. at 1533. The Court held that if a prisoner had good cause for failure to exhaust a potentially meritorious claim, the petitioner's interest in obtaining federal review of his claims outweighs the competing interests and it would be an abuse of discretion to apply the total exhaustion rule and dismiss a mixed petition. *Id.* at 1535.

The interplay between the total exhaustion rule applied in the Sixth and Tenth Circuits and the statute of limitations applicable to § 1983 claims would have the same results recognized by the Court in *Rhines*—it would force prisoners to "run the risk of forever losing their opportunity for any federal review" of their civil rights claims. *Rhines*, 125 S. Ct. at 1533; *see also Herrera*, 2005 WL 285015, at *10 ("[D]ismissal of the action for lack of total exhaustion could result in an inability to pursue the *exhausted* claim, because of a statute of limitations barrier or inability to pay a second filing fee.").

Even where a dismissal under the total exhaustion rule would not operate to bar a claim on statute-of-limitations grounds, it may still jeopardize a prisoner's ability to pursue a valid claim because it would require the payment of a sec-

ond filing fee. *See* 28 U.S.C. § 1915(b) (requiring that prisoners proceeding *in forma pauperis* pay filing fees in installments). Moreover, the dismissal may constitute a "strike" for purposes of the PLRA's "three strikes rule," which prevents prisoners who have had three actions or appeals dismissed for failure to state a claim, among other reasons, from filing *in forma pauperis*. 28 U.S.C. § 1915(g)).[5] Indeed, the Tenth Circuit, which has adopted a total exhaustion rule, *see Ross*, 365 F.3d at 1189, has also held that dismissal for failure to exhaust administrative remedies constitutes a "strike" for purposes of § 1915(g)). *See Steele*, 355 F.3d at 1213; *but see Snider v. Melindez*, 199 F.3d 108, 111 (2d Cir. 1999) (stating that dismissal for non-exhaustion is not the kind of dismissal contemplated by § 1915(g)).

Because the decision below is based upon a total exhaustion rule that is not mandated by the language of the PLRA, does not advance the policies underlying the PLRA, unduly interferes with a prisoner's right of access to the federal courts, and conflicts with decisions of other circuits, this Court should grant the petition.

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[5] Prisoners who are already subject to the prohibition of § 1915(g) will, if indigent, be barred from court entirely if their properly exhausted claims are dismissed under a total exhaustion rule.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition, the Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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November 17, 2005

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Nos. 05-7058 and 05-7142

In The Supreme Court of the United States

LORENZO L. JONES,

Petitioner,

v.

BARBARA BOCK, *et al.*,

Respondents.

TIMOTHY WILLIAMS and JOHN H. WALTON,

Petitioners,

v.

WILLIAM OVERTON and BARBARA BOUCHARD, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

JOINT APPENDIX
Volume I

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Petition For Certiorari In 05-7058 Filed October 13, 2005
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11/15/2002	*3	COMPLAINT – IFP (DT) (Entered: 11/18/2002)
11/19/2002	*4	OPININION and order by Judge Victoria A. Roberts, of partial dismissal as to defendants State of Michigan and Michigan Department of Corrections and order directing service of remaining defendants by US Marshal without prepayment of fees [EOD Date: 11/22/02] (lh) (Entered: 11/22/2002)
		* * *
01/13/2003	*11	MOTION by plaintiff Lorenzo Jones to name defendants Jane and John Doe with proof of service (no brief) (lh) (Entered: 01/14/2003)
		* * *
01/17/2003	*13	ORDER by Judge Victoria A. Roberts granting motion to name defendants Jane and John Doe by Lorenzo Jones [11-1] [EOD Date 1/22/03] (ew) (Entered: 01/22/2003)
		* * *
02/13/2003	*15	MOTION by defendants' Bock, V. Chaplin, Morrison, Opanasenko to dismiss for failure to comply with the exhaustion requirement of the PLRA with brief, attachment, exhibits A-C,

and proof of service. (PP) (Entered: 02/14/2003)

* * *

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* * *

03/18/2003 *20 ORDER by Judge Victoria A. Roberts, referring motion to stay discovery by Bock, V. Chaplin, Morrison, Opanasenko [16-1] to Magistrate Judge Steven D. Pepe, referring motion to dismiss for failure to comply with the exhaustion requirement of the PLRA by Bock, V. Chaplin, Morrison, Opanasenko [15-1] to Magistrate Judge Steven D. Pepe, for hearing and determination with proof of service [EOD Date 3/19/03] (dh) (Entered: 03/19/2003)

03/28/2003 *21 SUPPLEMENTAL response by plaintiff to motion response by Lorenzo Jones [18-1], with exhibits. (PP) (Entered: 03/28/2003)

* * *

07/30/2003 *26 REPORT and recommendation by Magistrate Judge Steven D. Pepe that motion to dismiss for failure to comply with the exhaustion requirement of the PLRA by Bock, V. Chaplin, Morrison, Opanasenko [15-1] be

granted in part and that plaintiff's claims against defendants Bock, Chaplin, Konke and Aldabaugh should be dismissed for failure to state claim [EOD Date: 8/1/03] with proof of service (lh) (Entered: 08/01/2003)

* * *

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09/25/2003 *35 JUDGMENT entered by Judge Victoria A. Roberts for defendants with proof of service [EOD Date: 9/29/03] (dh) (Entered: 09/29/2003)

* * *

11/04/2003 *38 MOTION by plaintiff Lorenzo Jones to reopen time for filing appeal with brief, verfication (dh) (Entered: 11/04/2003)

* * *

11/13/2003 *40 ORDER by Judge Victoria A. Roberts granting motion to reopen time for filing appeal by Lorenzo Jones [38-1]

		[EOD Date 11/14/03], with proof of service. (PP) (Entered: 11/14/2003)
		* * *
11/26/2003	*42	APPEAL by plaintiff Lorenzo Jones of orders [35-1] and [34-1] to USCA – FEE: not paid (do) (Entered: 12/03/2003)

General Docket
US Court of Appeals for the Sixth Circuit
#03-2576

Jones v. Bock

12/15/03 * Prisoner Case Docketed. Notice filed by Appellant Lorenzo L. Jones. Transcript needed: n (dtk)

* * *

4/14/04 * Appellee LETTER filed notifying they will not be filing a brief. Letter from Linda Olivieri for Appellee Barbara Bock. Certificate of service date 4/12/04 [03-2576] (dtk)

* * *

5/12/04 * BRIEF filed by Lorenzo L. Jones for Appellant Lorenzo L. Jones. Copies: 07. Certificate of service date 5/9/04 Number of Pages: 34. [03-2576] (rgf)

5/12/04 * APPENDIX filed by Lorenzo L. Jones for Appellant Lorenzo L. Jones. Copies: 07. Certificate of service date 5/9/04 [03-2576] SEE BRIEF FILED 05/12/04. (rgf)

4/15/05 * CAUSE SUBMITTED on briefs to panel consisting of Judges Batchelder, Cole, Reeves sitting on 06.08.05. [03-2576] (kal)

* * *

6/15/05 * Per Curiam OPINION filed: The judgment of the district court is AFFIRMED. Decision not for publication pursuant to local rule 28(g) [03-2576]. Alice M. Batchelder and R. G. Cole, Circuit Judges, Danny C. Reeves, District Judge (E/KY). (dtk)

7/7/05 * MANDATE ISSUED with no cost taxed [03-2576] (rgf)

* * *

UNITED STATES

DISTRICT COURT NORTHERN DISTRICT

Lorenzo L. Jones/Johnson,

Plaintiff, 02-[74336]

v. [Honorable Victoria A. Roberts
Mag. Judge Steven D. Pepe]

STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF CORRECTIONS, WARDEN, B. BOCK, DEPUTY WARDEN OF PROGRAMS V. CHAPLIN, CLASSIFICATION DIRECTOR, P. MORRISON AND CORRECTIONAL OFFICER OPANASENKO, HEALTH CARE JANE DOE AND JOHN DOE,

Jointly and Severally
Defendant, /

JURY TRIAL DEMANDED

COMPLAINT

THERE IS NO OTHER CIVIL ACTIONS ARISING OUT OF THE SAME TRANSACTION OR OCCURRENCE ALLEGED IN THIS COMPLAINT BETWEEN THE PARTIES HEREIN

/s/ Lorenzo L. Jones Johnson
Lorenzo Jones/Johnson-Pro se Plaintiff

(Filed Nov. 15, 2002)

NOW COMES, the Plaintiff, Lorenzo L. Jones/Johnson, through and by himself, for damages and injunction relief pursuant to 42 U.S.C. Sec 1983, alleging "Prison Officials Required Plaintiff to Work Beyond Plaintiff Physical Capabilities" "Retaliation" and "Harassment" in violation of the First, Eighth and Fourteenth

Amendments to the United States. The Plaintiff also alleges the Torts of "Infliction of Emotional Distress and Physical Pain and Suffering".

1. The Court has Jurisdiction over the Plaintiff's claims of violation of Constitutional rights under 42 U.S.C. sec 1331(a) and 1343.

2. The Court has supplemental Jurisdiction over the Plaintiff's State Law Tort claim under 28 U.S.C. sec 1367.

3. Plaintiff has exhausted all available administrative remedies. On September 15, 2001, the Plaintiff filed the appropriate grievance within the Department, citing each instant in which Plaintiff is alleging in this Complaint. The response to said grievance is undated, Plaintiff on October 11, 2001, filed a step II, grievance Appeal to the institutional Warden, on October 18, 2001, Warden Bock responded to Plaintiff's claims, however, the Warden failed to rectify the matter, and on November 2, 2001, the Plaintiff filed a step III grievance to the prison director, that step has yet to be responded to.

4. Defendant Opanasenko, is a Correctional Officer, employed within the Michigan Department of Corrections. This defendant is being sued in his individual capacity.

5. Defendant Bock, is the Institutional Warden and overseer at the Saginaw Correctional Facility, which the alleged incident occurred. This defendant is being sued in her individual and official capacity.

6. Defendant Chaplin, is the Deputy of programs and overseer of prisoners work assignments and have the duty to approve or deny work assignments for prisoners. This defendant is being sued in her individual and official capacity.

7. Defendant Morrison, is the Classification director and have the duty of requesting that a prisoner be placed on certain assignments This defendant is being sue in his individual and official capacity.

8. Defendant's Jane Doe and John Doe, are both Medical personnels and have the duty of Medically clearing a prisoner for work assignments within the Institutional. Both Jane and John Doe is being sued in their individual and official capacities.

9. All the Defendant's herein have acted and continue to act under the color of State law at all times pertinent to this Complaint.

10. On or about July 19, 2001, the Plaintiff was assigned to an unskilled work assignment within the prison setting as "Big Yard Equipment handler".

11. On or about July 23, 2001, the Plaintiff reported to the assigned area, at that time, Plaintiff informed officer Opanasenk, that the Plaintiff was unable to perform the requirements of said work assignment.

12. Being the Equipment Handler, required Plaintiff to lift, stand, bend and stoop. Plaintiff must also lift the standard Baseball Equipment bag, horseshoes, basketballs, etc.

13. Despite the obvious nature of Plaintiff's injuries, Officer Opanasenko told Plaintiff, that if the Plaintiff is not on the work assignment, that Plaintiff would be cited for a Major Out of Place. That there was nothing wrong with the Plaintiff.

14. Due to a motor vehicle accident within the Michigan Department of Corrections on November 14,

2000, as a proximate result of that accident the Plaintiff suffered the following injuries: Traumatic C5-C6 fracture dislocation with myelopathy, requiring open reduction, posterior wiring of C5 to C6, posterior fusing of C5 to C6 and harvesting of iliac bone from the right posterior iliac crest area. Small anterior hematoma in the spinal cord which resulted in temporary paralysis. Hairline fracture of the left arm. Abrasion to the scalp. Lower back injuries. Weakness in the upper and lower extremities on the left side. Numbness of entire body below the neck.

15. That at the time of the alleged incident herein, the Plaintiff was wearing a neck brace, left leg brace and walking with a cane, and under the medication of Baclofen, which causes fatigue, with a sedated side effect.

16. Defendant Opanasenko harassed the Plaintiff daily, telling Plaintiff that Plaintiff was "faking" his condition and that Plaintiff will do as Plaintiff was told or suffer the consequence.

17. Defendant Morrison, knew that due to Plaintiff current condition that Plaintiff was unable to perform the within work assignment. Plaintiff had verbally communicated with defendant Morrison and defendant Morrison knew of the Plaintiff condition.

18. Defendant V. Chaplin, as head of programming had a duly to check and see whether Plaintiff was medically cleared and physically able to perform a work detail. Defendant V. Chaplin, know, knew or should have known of the Plaintiff condition.

19. Defendant Bock, is the overseer of the institution that the Plaintiff is being housed at and it is defendant Bock duty to know whether or not the prisoners of the

within institution is being treated fairly and with dignity and not having sanctions imposed in an inhumane way. Defendant, Bock know, knew or should have known what was taking place within the prison setting that the defendant is the supervisor of.

20. Defendant's Jane Doe and John Doe owed to Plaintiff a duty to inform the appropriate staff members that the Plaintiff was unable to perform said duties.

21. Each defendant failed to act under the duties owed to Plaintiff, not to be placed in a position that would expose Plaintiff to a serious risk of serious injuries. Each defendant, know, knew or should have known that the Plaintiff was physically unable to perform the work assignment that issued to Plaintiff.

22. Consequently, due to Plaintiff being forced to work or receive a major citation, Plaintiff re-aggravated the injuries to Plaintiff's back, neck and shoulders, which caused the Plaintiff to increase the pain medication of Baclofen.

23. That as a proximate result of the defendant's breach of duties owed to Plaintiff, Plaintiff re-aggravated and re-injured Plaintiff's lower back, shoulders and neck.

24. That as a result of the violation of the Plaintiff's First, Eighth and Fourteenth Amendment rights, Plaintiff sustained the following injuries:

A. Physical pain and suffering, mental anguish, fright and shock.

B. Emotional and mental stress.

C. That Plaintiff will sustain each and every injury.

25. That Qualified Immunity does not apply to these defendant's because the defendant's knowingly violated clearly established Statutory and Constitutional rights of Plaintiff and acted outside the scope of their duties which would entitle the defendant's to Government Agent Immunity.

HARASSMENT

26. Plaintiff hereby, realleges, reaffirms and incorporates herein by reference each and every allegation contained in paragraphs 1 through 25, as though fully set in word for word.

27. That on August 20, 2001, the Plaintiff was harassed and intimidated by defendant Opanasenko, when the defendant attempted to make the Plaintiff remain at the recreation shack and lift up the baseball bag and hand it to another prisoner that was requesting the bag.

28. When Plaintiff refused to lift the baseball bag, the defendant threaten to have Plaintiff placed in Segregation until Plaintiff learn how to do what Plaintiff was told.

29. On August 21, 2001, defendant Opanasenko, informed Lieutenant Martin, that Plaintiff was staring at defendant during morning breakfast and that the defendant felt threaten by the stare of the Plaintiff.

30. Several minutes later, when Plaintiff returned to the unit from breakfast Lieutenant Martin call the Plaintiff out and explained to the Plaintiff that the defendant, Officer Opanasenko, had informed him that at morning breakfast Plaintiff was staring at the defendant in a

threaten manner and that the defendant wanted to place Plaintiff in segregation for Threaten Behavior.

31. This incident occurred even though the Plaintiff walk with a cane, had a foot and neck brace on and suffered paralysis on the left side of Plaintiff body.

32. The defendant, Officer Opanasenko, constantly harassed and degrade left the Plaintiff, causing the Plaintiff to suffer emotional and mental stress.

RETALIATION

33. On August 20, 2001, defendant Opanasenko, filed a work evaluation form on the Plaintiff, alleging that the Plaintiff was a poor worker and that Plaintiff actions in telling the defendant that Plaintiff was unable to perform those duties "appeared to be threaten".

34. For several days after the defendant filed the work evaluation report, defendant would see the Plaintiff and wink his eye and make comments of: how it feels to get paperwork written against you, or you need to quit it, there's nothing wrong with you.

CLAIM FOR RELIEF

35. That the actions of defendant, Officer Opanasenko in harassing and retaliating against the Plaintiff and making Plaintiff perform duties beyond Plaintiff physical capabilities violated Plaintiff First, Eighth and Fourteenth Amendment Rights, was done intentionally and without regard to Plaintiff's health and safety, was "Deliberate Indifference" and violated established Statutory or Constitutional Rights.

36. That failure of defendant's Bock, Chaplin and John and Jane Doe to act and rectify the issuing of Plaintiff a work assignment which the Plaintiff was and is physically incapable of performing constitute the violation of Statutory and Constitutional rights and created a greater risk of injuries to the Plaintiff.

37. That defendant Morrison, in requesting that the Plaintiff be placed on said assignment, willfully and wanton committed the act of Deliberate Indifference against Plaintiff in requesting that Plaintiff be place on said work assignment.

WHEREFORE, THE Plaintiff, respectfully request that this Honorable Court grant the following relief:

A. Issue a Declaratory Judgment stating:

I.

That the harassment and retaliation of Plaintiff and having Plaintiff perform duties beyond Plaintiff's physical capabilities by defendant Opanasenko violated the Plaintiff's rights under the First, Eighth and Fourteenth Amendment of the United States Constitutions.

II

That the failure of defendant's Bock, Jane and John Doe to curb the risk of placing the Plaintiff in a greater risk of physical injuries constitute a Deliberate Indifference under State and Federal Constitutional Law.

III

That defendant v. Chaplin approval of the assignment for Plaintiff violated the Plaintiff's First, Eighth and Fourteenth Amendment Right under the United States Constitutions. Placing the Plaintiff in greater risk of serious injuries.

IV

That defendant Morrison requesting that the Plaintiff be placed on said assignment violated the Plaintiff first, Eighth and Fourteenth Amendment Right to the United States Constitutions. Where the Plaintiff was placed on an assignment that exposed the Plaintiff to an excessive risk of injuries to Plaintiff's health and acted with Deliberate Indifference.

B. Issue an injunction ordering that defendant's Bock, V. Chaplin and Morrison or their designated person:

I

Remove the 363 assignment evaluation from the Plaintiff's institutional files and that no information pertaining to the work assignment exist in Plaintiff's files.

WHEREFORE, THE Plaintiff respectfully request that this Honorable Court grant Compensatory Damages JOINTLY and SEVERALLY in the amount of TEN THOUSAND DOLLARS ($10.000) against defendants Bock, Chaplin, Morrison, Opanasenko, John and Jane Doe.

AWARD PUNITIVE DAMAGES in the amount of TWENTY THOUSAND DOLLARS ($20.000) JOINTLY and SEVERALLY against defendants Opanasenko, Bock, V. Chaplin and Morrison. Plaintiff further claim Judgment for whatever Plaintiff is found to be entitled to, including Court cost, Attorney fees and interest from the date of filing this Complaint.

Dated: October 17, 2002

/s/ Lorenzo L. Jones/Johnson
By. Lorenzo L. Jones/Johnson
#176204

RESPONDEAT SUPERIOR

NOW COMES, the Plaintiff, Lorenzo L. Jones/Johnson, through and by himself and adds a Count alleging Respondent Superior as following:

38. Plaintiff hereby realleges, reaffirms and incorporate herein by reference all allegations in paragraphs numbered 1 through 37.

39. Defendant, Michigan Department of Corrections, is the employer of the Defendants, V. Chaplin, Bock, Morrison, Opanasenko and Jane and John Doe, who were acting within the course and scope of their employment with the defendant at the time of the alleged incident herein.

40. That in addition to the allegations set out in this Complaint, the defendants employer, the Michigan Department of Corrections is liable for the defendants violations under the doctrine of Respondeat Superior.

41. That as a proximate cause of defendants violations, the Plaintiff re-aggravated prior injuries, suffered emotional stress and other injuries and damages that is set above.

WHEREFORE, THE Plaintiff respectfully request that this Honorable Court grant Compensatory Damages in the amount of TEN THOUSAND DOLLARS (10.000).

AWARD PUNITIVE DAMAGES in the amount of TWENTY THOUSAND DOLLARS ($20.000).

VERIFICATION

I, Lorenzo Lee. Jones/Johnson, declare under the penalty of perjury that the information and statements herein are true and accurate to the best of my belief, information and knowledge

Dated: October 17, 2002

/s/ Loernzo L. Jones/Johnson
By. Lorenzo L. Jones/Johnson
#176204
9625 Pierce Road
Freeland, Michigan 48623

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LORENZO L. JONES, #176204

Plaintiff,

vs.

STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF CORRECTIONS, B. BOCK, V. CHAPLIN, P. MORRISON, OFFICER OPANASENKO, JANET KONKLE, AND AHMED ALDABAUGH,

Defendants.
_____/

Case No. 02-74336

HONORABLE VICTORIA A. ROBERTS
HONORABLE STEVEN D. PEPE

REPORT AND RECOMMENDATION

(Filed Jul. 30, 2003)

Lorenzo Jones ("Plaintiff") is a prisoner in the custody of the Michigan Department of Corrections ("MDOC"). On November 15, 2002, he filed a complaint against the above named defendants pursuant to 42 U.S.C. § 1983, alleging violations of his rights under the First, Fourth, and Fourteenth Amendments. Plaintiff is proceeding *in forma pauperis*. Defendants have filed a motion to dismiss and a motion to stay discovery, both of which were referred for hearing and determination pursuant to 28 U.S.C. § 636(b)(1)(A).[1] For the following reasons, defendants'

[1] Because Defendants' motion to dismiss is a dispositive motion, the undersigned Magistrate Judge may issue only a Report and

(Continued on following page)

motion to dismiss should be GRANTED IN PART. Plaintiff's claims against Defendants Bock, Chaplin, Konkle, and Aldabaugh should be DISMISSED for failure to state a claim; however, Plaintiff has exhausted federal constitutional claims with respect to Defendants Morrison and Opanasenko and, thus, these claims should not be dismissed at this time.

I. FACTUAL AND PROCEDURAL BACKGROUND

On November 14, 2000, Plaintiff was involved in a motor vehicle accident while in the custody of MDOC, which resulted in significant injury. Plaintiff alleges that he suffered a C5-6 fracture dislocation with myelopathy which required fusion surgery. He also suffered a hematoma to the spinal cord, hairline fracture to his left arm, abrasions on his scalp, lower back injuries, upper and lower extremity weakness on the left side, and numbness below his neck.

On or around July 19, 2001, Defendant Morrison, who determines the work assignments of prisoners at the facility in which Plaintiff is incarcerated, assigned Plaintiff to a position as the "Big Yard Equipment Handler," which involves lifting, standing, bending, stooping, and passing out equipment such as the baseball equipment bag, horseshoes, and basketballs. Plaintiff claims that he notified Morrison of his injuries, but that the assignment was not changed. Plaintiff reported to this assignment on or around July 23, 2001, and informed the staff member in charge, Defendant Opanasenko, that he could not perform

---

Recommendation, not a final determination, on that motion. 28 U.S.C. § 636(b)(1)(A).

the duties required because of his injuries. Plaintiff wore a neck brace and a left leg brace and walked with a cane. Allegedly, Opanasenko stated that Plaintiff was faking his injuries and told Plaintiff that he could either perform his work assignment "or suffer the consequences." Plaintiff claims that he chose to work in order to avoid receiving a major misconduct ticket; as a result, he aggravated his injuries. Plaintiff also claims that Opanasenko harassed him by threatening to place Plaintiff in segregation if he did not perform his job and by telling a superior officer that Plaintiff was staring at him in a threatening manner. Plaintiff finally asserts a retaliation claim by stating that Defendant Opanasenko issued a false work evaluation. Essentially, Plaintiff is alleging First Amendment retaliation and Eighth Amendment deliberate indifference claims against Opanasenko and a deliberate indifference claim against Morrison.

Plaintiff also asserts that Defendants Chaplin, a deputy warden who apparently is in charge of approving work assignments; Warden Barbara Bock; Konkle, a registered nurse; and Aldabaugh, a physician,[2] either knew or should have known of Plaintiffs alleged inability to work and should have rectified the situation. He asserts that Defendant Chaplin violated the First, Eighth, and Fourteenth Amendments and that Bock, Konkle, and Aldabaugh violated the Eighth Amendment through their deliberate indifference to his medical needs. Finally, Plaintiff alleges a claim of respondeat superior against

[2] In his complaint, Defendants Konkle and Aldabaugh were named as Jane and John Doe. Plaintiff subsequently filed a motion to add Konkle and Aldabaugh as defendants, which motion was granted on January 17, 2003. These two defendants have not yet been served.

MDOC. On November 19, 2002, District Judge Victoria Roberts dismissed Plaintiff's claims against MDOC and the State of Michigan because those defendants were entitled to immunity under the Eleventh Amendment.

On February 13, 2003, Defendants Bock, Chaplin, Morrison, and Opanasenko filed a Rule 12(b)(6) motion to dismiss for failure to exhaust and a motion to stay discovery. Plaintiff responded to the Rule 12(b)(6) motion on February 21, 2003, and again on March 28, 2003. He claims he did comply with the exhaustion requirement by explaining the exhaustion process in his complaint and that Defendants attached evidence of exhaustion to their motion to dismiss.

II. ANALYSIS

A. Rule 12(b)(6)

In deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), a court must accept all well-pleaded allegations as true and construe them in the light most favorable to plaintiff. *Zinermon v. Burch*, 494 U.S. 113, 117 (1990); 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357, at 304 (2d ed. 1990). *See also Jenkins v. McKeithen*, 395 U.S. 411, 421-22 (1969); *Westlake v. Lucas*, 537 F.2d 857 (6th Cir. 1976). A complaint will not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Moreover, *pro se* complaints are to be construed liberally. *Haines v. Kerner*, 404 U.S. 519, 520 (1972). Ordinarily, a court may decide a motion to dismiss only on the basis of the pleadings. *See Song v. City of Elyria, Ohio*,

985 F.2d 840, 842 (6th Cir. 1993). Additionally, the Prison Litigation Reform Act of 1995 ("PLRA") mandates that a court screen a prisoner's complaint and dismiss any claims raised that are frivolous, malicious, or fail to state a claim upon which relief may be granted, 28 U.S.C. § 1915A(b)(1); *McGore v. Wrigglesworth*, 114 F.3d 601, 608 (6th Cir. 1997), and may dismiss any such claim without first requiring exhaustion of administrative remedies. 42 U.S.C. § 1997e(c).

B. Exhaustion of Administrative Remedies

The PLRA, which applies to all claims filed after April 26, 1996, requires a prisoner to exhaust all administrative remedies before bringing a federal suit regarding prison conditions. 42 U.S.C. § 1997e(a). This requirement applies to all § 1983 claims that fall under "the definition of a 'civil action with respect to prison conditions' as set forth in 18 U.S.C.A. § 3626(g)(2)." *Hartsfield v. Vidor*, 199 F.3d 305, 308 (6th Cir. 1999) (footnote omitted) (applying exhaustion requirement to prisoner's equal protection claim). That section provides:

> the term "civil action with respect to prison conditions" means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison. . . .

18 U.S.C.A. § 3626(g)(2).

The exhaustion provision of the PLRA provides in pertinent part, "[n]o action shall be brought with respect

to prison conditions under section 1983 of this title, or any other federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). The Supreme Court has held that the exhaustion requirement must he satisfied, so long as some responsive action is available, even if the relief sought is not available. *Booth v. Churner,* 532 U.S. 731, 736-41, 740 n.5 (2001).

The Sixth Circuit has applied the requirements of the PLRA to hold that a prisoner who files a § 1983 claim involving prison conditions must *allege* and *show* that he has exhausted all available state administrative remedies. *Brown v. Toombs,* 139 F.3d 1102, 1104 (6th Cir. 1998). That Court has further stated that when filing a civil complaint regarding prisoner conditions, "a prisoner must plead his claims with specificity and show that they have been exhausted by attaching a copy of the applicable administrative dispositions to the complaint or, in the absence of written documentation, describe with specificity the administrative proceeding and outcome." *Knuckles-El v. Toombs,* 215 F.3d 640, 642 (6th Cir. 2000). Failure to demonstrate exhaustion *with the complaint* can result in dismissal for failure to state a claim. *Baxter v. Rose,* 305 F.3d 486, 489 (6th Cir. 2002). Moreover, grievances filed in an attempt to exhaust administrative remedies must name the individual subjects of the grievances so prison officials can address the claims before a suit is brought in federal court. *Curry v. Scott,* 249 F.3d 493, 505 (6th Cir. 2001).

C. Factual Analysis

1. *Defendants Bock, Chaplin, Konkle, and Aldabaugh*

Although Plaintiff alleges First and Fourteenth Amendment[3] claims against Chaplin, he states no facts that would support such claims. Rather, Plaintiffs factual allegations potentially support only claims that these four defendants were deliberately indifferent to his medical needs by failing to remove him from the work detail he claims he could not perform. Yet, he has failed to state a claim upon which relief could be granted with respect to any of these defendants; Plaintiff's claims against these four defendants should be dismissed.

Prison officials may be liable under the Eighth Amendment for deliberate indifference to inmates' health or safety. *Farmer v. Brennan*, 511 U.S. 825, 832-35 (1994). In order to be held liable, the official must know of and disregard an excessive risk to inmate health or safety. *Id.* at 837. The prisoner must show that the official acted or failed to act despite his knowledge of a substantial risk of serious harm. *Id.* at 841-42. A claim of deliberate indifference requires a showing of more than mere negligence and less than actual intent. *See Sanderfer v. Nichols*, 62 F.3d 151, 154 (6th Cir. 1995) (equating deliberate indifference with "criminal recklessness, which requires a subjective showing that the defendant was aware of the risk of harm."); *Gibson v. Foltz*, 963 F.2d 851, 853 (6th Cir. 1992)

[3] Based upon Plaintiff's allegations, which are devoid of any due process or equal protection issues, his Fourteenth Amendment claim can be cited only for the fact that the Fourteenth Amendment applies to protections of the first eight amendments to the Constitution to the states.

("Obduracy or wantonness, not inadvertence or good faith error, characterizes deliberate indifference."); *Ribble v. Lucky*, 817 F. Supp. 653, 655 (E.D. Mich. 1993) (finding even "gross negligence" by prison officials insufficient to support a claim of deliberate indifference).

Thus, to satisfy this objective component, a plaintiff must allege a deprivation that is "sufficiently serious." "[O]nly those violations denying 'the minimal civilized measure of life's necessities' are sufficiently grave to form the basis of an Eighth Amendment violation." *Wilson v. Seiter*, 501 U.S. 294, 298 (1991) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)). Additionally, the Court has required a showing of "extreme deprivations . . . to make out a conditions-of-confinement claim." *Hudson v. McMillian*, 503 U.S. 1, 9 (1992).

A medical need is "serious" if it has been diagnosed by a physician as requiring treatment or is so obvious that a lay person would easily recognize the necessity for a doctor's attention. *Monmouth County Correctional Inst. Inmates v. Lanzaro*, 834 F.2d 326, 347 (3d Cir. 1987), *cert. denied*, 486 U.S. 1006 (1988). A serious ailment requires immediate attention or is potentially life-threatening: "[a] 'serious' medical need exists if the failure to treat a prisoner's condition could result in further significant injury or the 'unnecessary and wanton infliction of pain.'" *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992) (citation omitted), *overruled on other grounds by WMX Techs., Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997). *Farmer* explains further that in order to demonstrate the subjective element of deliberate indifference, "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. . . ." 511 U.S. at 836-37.

This subjective element may be proven, however, when circumstantial evidence shows that the risk of harm was so obvious that an official must have known of its existence. *Ewolski v. City of Brunswick*, 287 F.3d 492, 513 n.7 (6th Cir. 2002) (citing *Farmer*, 511 U.S. at 842).

Here, Plaintiff makes no assertions that any of these defendants had any direct role in the job assignment, and makes only conclusory allegations that any of these defendants knew of a serious risk of harm to Plaintiff or actually drew such an inference. Without more detail, such conclusory assertions cannot be the basis of a § 1983 claim. *See Ana Leon T. v. Federal Reserve Bank*, 823 F.3d 928, 930 (6th Cir. 1987); *Chapman v. City of Detroit*, 808 F.2d 459, 465 (6th Cir. 1986).

He claims that Defendant Chaplin must agree to all work assignments, but makes no assertion that Chaplin actually knew of facts from which he could infer the existence of a substantial risk of harm, nor does he provide concrete assertions that Chaplin actually drew such an inference. The same is true of his assertions against Defendant Bock. With regard to nurse Konkle and Dr. Aldabaugh, Plaintiff states only that they had the duty to inform other MDOC officials that he could not perform the duties of the equipment handler. Even if such a duty exists, and even if the failure to inform other MDOC staff members of the extent of Plaintiff's impairments was negligent, the has not alleged that these two health care workers actually drew the inference that a serious risk of harm existed. Medical malpractice, without more, does not constitute an Eight Amendment violation.

Rather, he seems to assume that because he wore neck and leg braces and used a cane, these defendants

should have determined that he could not perform his job because the risk of harm was obvious. Even assuming that all four of these defendants had knowledge of Plaintiff's condition, he makes only conclusory and unsupported assertions that his condition was sufficiently serious for the defendants' inaction to rise to the level of deliberate indifference. The fact that Plaintiff continued to suffer from his injuries does not necessarily mean he could not perform the job at issue. It is of note that of the medical records Plaintiff attached to his response to the motion to dismiss to support his claim that he could not work, the only document that sheds any light on his ability to work is a form completed by a physician noting that Plaintiff was unable to perform certain work between November 14, 2000 – the date of his injury – and March 12, 2001 – four months prior to the time he was assigned to the Big Yard Equipment Handler position. Considering Plaintiff's allegations in the light most favorable to him, it cannot be said that Plaintiff adequately alleged that these four defendants either knew of a serious risk of harm or drew such an inference. As such, Plaintiff cannot state a cognizable deliberate indifference claim against Defendants Bock, Chaplin, Konkle, and Aldabaugh, and these claims should be dismissed.

2. *Defendants Opanasenko and Morrison*

Plaintiff alleges that Defendants Morrison and Opanasenko were deliberately indifferent to his medical needs and that Opanasenko retaliated against him in violation of the First Amendment. Based solely upon the allegations in his complaint viewed in the light most favorable to Plaintiff, he appears to have asserted cognizable constitutional claims in this regard. Thus, whether

Plaintiff met the exhaustion requirement is a necessary consideration. In his responses to defendants' motion to dismiss, Plaintiff asserts both that he adequately described the exhaustion procedures in his complaint as permitted by *Knuckles-El* and that he submitted proper documentation of exhaustion in those responses. Although Plaintiff does state in his complaint that he filed the necessary grievances, providing the dates on which such grievances were filed, he only states that the grievances "cit[ed] each instant in which [sic] Plaintiff is alleging in this complaint." Compl. at 2. Yet, he does not explain the specific issues raised by the grievance or why the grievance and its appeals were denied. Without such explanation, this Court cannot make a finding that he described the process with the needed specificity.

Moreover, although Plaintiff attached the Step I grievance and the Step II and III appeals to his responses to the motion to dismiss, such conduct does not satisfy the exhaustion requirement. A prisoner may not amend a complaint to satisfy the exhaustion requirement when he has not complied with that requirement in the first instance. *Baxter,* 305 F.3d at 489. *Baxter* has been cited by at least one unpublished case to hold that *sua sponte* dismissal for failure to exhaust was proper even where a plaintiff submitted evidence of exhaustion after he had filed his complaint. *Zeigler v. Michigan,* 2003 U.S. App. LEXIS 2239 (6th Cir. Feb. 6, 2003) (unpublished). Thus, these arguments do not preclude dismissal.

Yet, Plaintiff also notes that in the motion to dismiss, *defendants* provided the documentation necessary to establish exhaustion and thus, dismissal of his claims is not appropriate. This issue has not explicitly been addressed by this or any other circuit. Defendants do, in fact,

attach documentation that indicates Plaintiff filed a Step I grievance which he appealed through Step III.[4]

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[4] Defendants attach this documentation in an effort to show that Plaintiff failed to exhaust *all* of his claims, arguing that his failure to exhaust even one claim raised in the lawsuit requires dismissal of the entire complaint. Defendants' argument in this regard in unavailing. In support of this claim, defendants cite *Smith v. Federal Bureau of Prisons*, 300 F.3d 721 (6th Cir. 2002); *Linder v. Sundquist*, 2002 U.S. App. LEXIS 19662 (6th Cir. Sept. 18, 2002) (unpublished); and *Kemp v. Jones*, 2002 U.S. App. LEXIS 16058 (6th Cir. Aug. 6, 2002) (unpublished).

Both *Smith* and *Linder* dismissed the plaintiffs' claims for failure to exhaust; however, in both cases, the plaintiff had not exhausted *any* claims. *Smith, supra*, at 723; *Linder, supra*, at *4. In *Kemp*, the court did dismiss all of the plaintiff's claims despite the fact that some of those claims were exhausted. *Kemp, supra*, at *3-*4. The court cited *Mack v. DeWitt*, 2002 U.S. App. LEXIS 8609 (6th Cir. Apr. 30, 2002) (unpublished), to support this finding. *Id.* In *Mack*, however, the plaintiff's claims were dismissed because, as in *Smith* and *Linder*, the plaintiff did not attach any documentation to support a finding that he exhausted his administrative remedies for *any* of his claims. *Mack, supra*, at *4-*5. Because *Kemp* is not based on any authority that supports its ultimate holding, this Court should not follow *Kemp*.

Smeltzer v. Hook, 235 F. Supp. 2d 736, 2002 U.S. Dist. LEXIS 17686 (W.D. Mich. 2002), and *Keenan v. Twommey*, 2000 U.S. App. LEXIS 21200 (6th Cir. Aug. 10, 2000) (unpublished) (simply affirming, but not discussing, a district court ruling with the same reasoning as *Smeltzer*), neither of which are cited by defendants, provide some support for defendants' claim. *Smeltzer*, preferring "total exhaustion" over "claim exhaustion," focuses on the language of § 1997e(a), which requires exhaustion to be complete before a prisoner can bring an "action," and decides that failure to exhaust even one claim requires dismissal of the entire "action" rather than just that claim. *Smeltzer, supra*, at *20-21. *Smeltzer* also discusses policy arguments for requiring total exhaustion such as conservation of judicial resources, discouraging prisoners from raising unexhausted claims, and a similar requirement in habeas cases. *Id* at *23-25.

While *Smelter* distinguishes between dismissing "actions" and "claims," it is not clear that the different language indicates that Congress intended to require dismissal of an entire case when a

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prisoner fails to exhaust even one claim. Section 1997e(a) states that a prisoner may not bring an action without first exhausting available administrative remedies. Yet, once any unexhausted claims are dismissed, the action only involves exhausted claims, and even under defendants' theory, § 1997e(a) will be satisfied.

Additionally, the policy arguments set forth in *Smeltzer* are not convincing. The PLRA already provides significant motivation to exhaust. Although many prisoners fail to do so, many others have realized the effect of § 1997e(a) and at least attempt to carefully comply with the statute. While *Smeltzer* argues that judicial resources will be conserved by following this rule, the likely result is that a prisoner whose exhausted claims are dismissed under "total exhaustion" will simply refile his complaint alleging only the exhausted claims. *See Cooper v. Garcia*, 55 F.Supp. 2d 1090, 1095 (S.D.Cal. 1999); *Jenkins v. Toombs*, 32 F.Supp. 2d 955, 959 (W.D.Mich. 1999). As such, each such lawsuit will actually turn into two lawsuits and, assuming the statute of limitations does not bar refiling, the court will be required to address the issues regardless of "total exhaustion," *Cooper*, 55 F.Supp. 2d at 1094-95. In this case, the limitations period will not run until at least July 2004.

Moreover, although *Smeltzer* analogizes to the habeas context in which prisoners are required to completely exhaust state remedies prior to filing suit, in habeas cases a federal court may order a stay of federal proceedings to allow a prisoner to exhaust state remedies – a remedy not generally available in prisoner § 1983 litigation. *See Duncan v. Walker*, 533 U.S. 167, 182-83 (2001) (Stevens, J., concurring) (suggesting that a stay to permit state exhaustion in *habeas* cases is proper); *Palmer v. Carlton*, 276 F.3d 777, 781 (6th Cir. 2002) (adopting Justice Stevens' argument in *Duncan*); *Freeman v. Francis*, 196 F.3d 641 (6th Cir. 1999) (holding that a prisoner's failure to exhaust prior to filing a § 1983 lawsuit requires dismissal); *Wright v. Morris*, 111 F.3d 414 (6th Cir. 1997) (noting that prior to passage of the PLRA, granting a stay in a prisoner's § 1983 lawsuit was permissible when exhaustion was not completed prior to filing, but that exhaustion prior to filing suit is now mandatory).

Recently, the Sixth Circuit has issued an unpublished decision adopting the "total exhaustion" approach. *Shorter v. Campbell*, 2003 U.S. App. LEXIS 3343, *5-*6 (6th Cir. Feb. 20, 2003) (unpublished) (citing *Julian-Bey v. Crowley*, 24 Fed. Appx. 393, 2001 U.S. App. LEXIS 26192 (6th Cir. Dec. 3, 2001) (unpublished order)). Both cases rely on *Brown v. Toombs*, 139 F.3d 1102 (6th Cir. 1998), to support their

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Thus, the first question that must be addressed is whether a complaint must be dismissed for failure to exhaust when a plaintiff does not demonstrate exhaustion with the complaint, but where the *defendant* provides evidence of exhaustion. This is a different situation than involved in *Baxter* and not one a Plaintiff could manipulate to try to avoid a dismissal as in *Baxter*.

The primary purpose of the PLRA was to reduce the number of frivolous lawsuits and to provide for more efficient adjudication of non-frivolous suits filed by prisoners. *See, e.g., Porter v. Nussle*, 534 U.S. 516, 524-25 (2002); *Freeman v. Francis*, 196 F.3d 641, 644 (6th Cir. 1999).

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holdings. *Id.* ("*Brown* makes it explicit that a prisoner must exhaust his administrative remedies before filing his complaint. *Brown* makes no provision for a 'mixed' complaint. There must be exhaustion of every grievance filed." (citations omitted)). Essentially, *Shorter* and *Julian-Bey* reach the conclusion that because *Brown* did not explicitly indicate that "mixed" complaints were permissible it, in fact, rejected such a possibility.

To the contrary, published Sixth Circuit authority has indicated otherwise. *Knuckles-El v. Toombs*, 215 F.3d 640 (6th Cir. 2000), decided subsequent to *Brown*, stated

> [w]e reserve to another day the question of whether exhausted claims in a "mixed" complaint should be addressed when such claims otherwise meet the pleading requirements or whether such a complaint should be dismissed in its entirety. The complaint here does not meet the pleading requirements set forth in *Brown* . . . and it was therefore properly dismissed.

Knuckles-El, 215 F.3d at 642. The court explicitly differentiated between the requirements in *Brown* and the undecided question of whether a prisoner's complaint must be dismissed for failure to exhaust only some of the claims raised. While *Knuckles-El* did leave open the question of whether "total exhaustion" or "claim exhaustion" would be the correct method to adopt, it certainly did not interpret *Brown* as requiring "total exhaustion," and no subsequent published authority has interpreted *Brown* in the manner suggested by *Shorter*.

Protection of agency autonomy and promotion of judicial efficiency have also been cited as motivations behind the exhaustion requirement. *See, e.g., Brown v. Toombs*, 139 F.3d 1102, 1103-04 (6th Cir. 1998); *Wright v. Morris*, 111 F.3d 414, 421 (citing *McCarthy v. Madigan*, 503 U.S. 140 (1992), *superceded by statute on other grounds as noted in Booth v. Churner*, 532 U.S. 731, 739-40 (2001)).

When a defendant admits that certain arguments have been exhausted and/or supplies a court with demonstration of such exhaustion, certain of the above concerns behind the PLRA are either diminished or non-existent. Agency autonomy is no longer in question, as the defendant(s) – in this case, employees of MDOC, the agency at issue – shows that the agency had the opportunity to address certain of the complaints and deal with the issues internally before a lawsuit was filed. Especially when the defendant provides copies of the grievances and appeals filed, concerns of judicial efficiency are diminished because, as noted in *Porter v. Nussle*, "adjudication [can] be facilitated by an administrative record that clarifies the contours of the controversy." 534 U.S. at 525. Such documentation also helps a court begin to determine the relative merit or frivolity to a prisoner lawsuit – at least as much as in situations where the documentation is attached to the original complaint.

Moreover, while *Baxter* appears to require dismissal for the Plaintiff's failure to demonstrate exhaustion with the complaint despite these policy considerations, that case is distinguishable from the present case. In *Baxter*, the district court, holding that a *plaintiff* cannot amend a complaint to cure a defect in pleading exhaustion, dismissed the plaintiff's complaint *sua sponte* because the prisoner had failed to show in his complaint that he had

exhausted his administrative remedies. *Baxter*, 305 F.3d at 488-89. Indeed, in *Baxter*, plaintiff had not even alleged that he had completed the exhaustion requirement against the defendants. Plaintiff in the present case did allege that he had completed exhaustion against the Defendants, and even gave the precise dates on which the grievance and appeals were filed, but failed to attach the necessary documentation. The *defendants* did attach the missing documents evidencing exhaustion to their motion to dismiss prior to Plaintiff's attempt to supplement the record by attaching the same documentation. Defendants' motion was filed on February 13, 2003. This case was not referred to the undersigned until March 18, 2003. Thus, when the undersigned first received this case for consideration, proof of exhaustion was already present in the record through a filing provided by *defendants*. Were this Court to recommend *sua sponte* dismissal as envisioned in *Baxter*, which would often take place before supplemental evidence of exhaustion could be provided, such a recommendation and action would not greatly facilitate the policy considerations that lie behind the exhaustion requirement. Because the defendants supplemented the record *before* the present case was referred to the undersigned, *Baxter's* reasoning seems inapplicable here. Accordingly, there is no logical reason why the grievances attached to defendants' motion to dismiss should not be considered for exhaustion purposes. Because the statute of limitations has not run, and dismissal would be without prejudice, the case would likely be re-filed with documents on exhaustion that are before the Court attached.

Therefore, the next question is whether Plaintiff, through the grievance and appeals attached to defendants' motion to dismiss, properly exhausted his claims against

Defendants Morrison and Opanasenko. Defendants argue that although Plaintiff listed many people as subjects of his grievance, the body of the grievance dealt only with Plaintiff's poor work evaluation, upon which his First Amendment retaliation claim is partially based.

The grievance forms attached to Defendants' brief do show that the grievance was about Plaintiffs dispute with Officer Opanasenko over his claim he could not do the equipment handling job. He claims that after he complained to the "Classification Director" [Morrison] apparently about his job assignment, he was told to write a grievance. Plaintiff thereafter told Defendant Opanasenko that he could not physically do the job. Defendant Opanasenko allegedly began to harass him, insisted that Plaintiff pick up equipment and hand the items to other inmates, and stand around for 15-20 minutes, even though he still wore a neck brace and walked with a cane. Plaintiff claimed that Defendant Opanasenko "fabric[ated] an assignment evaluation form" and falsely indicated that Plaintiff had written that he sought to be removed from this detail. Defendant Opanasenko also allegedly threatened to write a ticket on Plaintiff for threatening behavior, but did not. Rather, he wrote the negative work evaluation. Plaintiff asserts generally that Morrison and Opanasenko were aware of his current condition related to his spinal cord injuries. He claims the "work assignment report" will cause Plaintiff irreparable harm hurting his chances for parole, and that these two defendants and others knew or should have known that their actions violated Plaintiff's First, Eighth, and Fourteenth Amendment rights. His grievance request for relief included an apology, suspension of Defendant Opanasenko for 7 days without pay, and removal of his negative job evaluation,

and no work assignments without his "personal outside doctor's" approval and no "retaliatory actions" against him. He even argued that "Qualified Immunity" should not shield the officials for civil damages.

At Step I, this was treated as a complaint only about the negative job evaluation which was upheld. Apparently at his interview on the grievance he "stated his only issue is that he was written a 'bad' work report that is not true".

At Step II, he complained that all of the individuals and issues were not addressed at Step I. The response indicated that "Classification" and Health Care" had cleared Plaintiff as "physically capable" for a light duty detail like the handing out of recreation equipment. Yet, the grievance reviewer, Warden Bock, reasoned that because Defendant Opanasenko apparently signed the work evaluation both as "evaluator and Supervisor" it was improper. Thus, it was ordered to be removed from Plaintiff's file with Defendant Opanasenko allowed to "re-do" it and "have a supervisor sign it." Thus Warden Bock determined that the "[g]rievance is partially resolved at step II."

At Step III Plaintiff challenged the validity of the finding that he had been cleared by Health Care for the work assignment and claimed Warden Bock at Step II "attempt[ed] to side step and over look the issues at bar." He challenged Warden Bock permitting Officer Opanasenko to rewrite the work evaluation because of the "unreasonable practice by the Department of Corrections and it[s] agents," which would include the Classification Director specifically named at Step I. Plaintiff again asserted that the "first, eight and fourteenth Amendments protests (sic, "protects") Plaintiff from such practice and harm." He

repeated his earlier demand for relief including his not being cleared for work without his personal Doctor's consent.

While not particularly "pretty" and quite conclusory, it cannot be said that this does not assert an Eight Amendment "deliberate indifference" claim against Defendants Morrison and Opanasenko and a First Amendment retaliation claim against Defendant Opanasenko. Plaintiff claims that Opanasenko harassed him and required him to perform the equipment handler position despite his injuries. Such allegations can he found sufficient for purposes of exhaustion. *Burton v. Jones*, 521 F.3d 569, 575 (6th Cir. 2003).

> [F]or a court to find that a prisoner has administratively exhausted a claim against a particular defendant, a prisoner must have alleged mistreatment or misconduct on the part of the defendant at Step I of the grievance process. In describing the alleged mistreatment or misconduct, however, we would not require a prisoner's grievance to allege a specific legal theory or facts that correspond to all the required elements of a particular legal theory. Rather, it is sufficient for a court to find that a prisoner's Step I problem statement gave prison officials fair notice of the alleged mistreatment or misconduct that forms the basis of the constitutional or statutory claim made against a defendant in a prisoner's complaint.

Id. As explained, this "fair notice" standard does not require a prisoner to provide all the details of the alleged wrongdoing and is in accord with the legislative purposes of § 1997e(a) as stated in *Porter*. *Id.* A prisoner must simply provide a sufficient statement to inform prison

officials of his complaints and against whom they are directed.

While Plaintiff does not specifically name Morrison, the grievance specifically states that the "Classification Director," which is Morrison's position, and later Department of Correction "agents," required him to perform this work despite having knowledge that Plaintiff was incapable of its performance. Although the *Curry* case requires each defendant to be specifically named, where a plaintiff lists a particular position that is held by only one person, that requirement should be considered to be met.

Here, although the majority of Plaintiff's grievance does address the work report written by Opanasenko, Plaintiff also stated that his injury prevented him from performing the duties of an Equipment Handler and that both Opanasenko and the Classification Director (Morrison) required him to perform that job despite having knowledge of that fact. Mot. to Dismiss, Ex. A at 8-9. While not terribly specific, Plaintiff's grievance was sufficient to provide "fair notice" that he was grieving more than the work evaluation written by Opanasenko. He specifically raised claims that Opanasenko and Morrison should not have required him to perform the equipment handler position. The fact that the person writing the response to the Step I grievance did not address Plaintiff's allegations that Opanasenko and Morrison required him to perform work beyond his ability does not negate the fact that Plaintiff did raise those issues, albeit briefly, in his Step I grievance. He also notes that after informing Defendant Opanasenko of his condition, he was harassed and a ticket was threatened and a negative job evaluation written. This was coupled with a generalized claim that his First Amendment rights as well as his Eight Amendment rights

were violated. Thus, it is found that the exhaustion requirement is satisfied with respect to Defendants Opanasenko and Morrison, and defendants' motion should be denied in that regard.

III. RECOMMENDATION

For the reasons stated above, IT IS RECOMMENDED that defendants' motion be GRANTED IN PART. Plaintiff's claims against Defendants Bock, Chaplin, Konkle, and Aldabaugh should be DISMISSED for failure to state a claim; however, his claims against Defendants Morrison and Opanasenko should not be dismissed at this time.

The parties to this action may object to and seek review of this Report and Recommendation, but are required to file any objections within ten (10) days of service of a copy of this Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1) and E.D. Mich. LR 72.1(d)(2). Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). Filing of objections which raise some issues but fail to raise others with specificity, will not preserve all the objections a party might have to this report and recommendation. *Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this Magistrate Judge.

Within ten (10) days of service of any objecting party's timely filed objections, the opposing party may file a response. The response shall be not more than twenty (20) pages in length unless by motion and order such page limit is extended by the Court. The response shall address

specifically, and in the same order raised, each issue contained within the objections.

Dated: July 30, 2003
Ann Arbor, Michigan

/s/ Steven D. Pepe
Steven D. Pepe
United States Magistrate Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LORENZO JONES,

Plaintiff,

vs

Case No: 02-74336
Honorable Victoria A. Roberts

WARDEN BOCK, ET AL

Defendants. /

ORDER ADOPTING REPORT AND RECOMMENDATION, IN PART

(Filed Sep. 25, 2003)

I. Introduction

This matter is before the Court on Defendants' 12(b)(6) Motion to Dismiss [Doc. 15]. Plaintiff, proceeding *pro se*, is a prison inmate whose complaint alleges that as a result of Defendants' indifference to his condition, he was forced into a physical assignment which aggravated previous injuries. Defendants move to dismiss for failure to comply with the exhaustion requirement of the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(a). Plaintiff responded. Magistrate Judge Steven Pepe issued a Report and Recommendation recommending that certain of the Defendants – Bock, Chaplin, Konkle and Aldabaugh – should be dismissed for failure to state a claim. The Magistrate Judge recommended, however, that the claims against Defendants Morrison and Opanesenko should not be dismissed, finding that Plaintiff had exhausted constitutional claims. Both Plaintiff, and Opanesenko and Morrison, filed objections.

II. FACTUAL BACKGROUND

The Court has conducted a *de novo* review of the pleadings and papers filed. The Court accepts the Magistrate's recommendation with respect to Bock, Chaplin, Konkle and Aldabaugh. However, the Court overrules the Magistrate's finding concerning Morrison and Opanesenko.

In order to effectuate the exhaustion requirement of 42 U.S.C. § 1997e(a), the PLRA, a prisoner must plead his claims with specificity and show that they have been exhausted, by attaching a copy of the applicable dispositions to the complaint, or, in the absence of any documentation, describe with specificity the administrative proceeding and its outcome. *Knuckles-El v Toombs*, 215 F.3d 640, 642 (6th Cir. 2000). Failure to demonstrate exhaustion with the complaint can result in dismissal for failure to state a claim. *Baxter v. Rose*, 305 F. 3d 486, 489 (6th Cir. 2002). Moreover, grievances filed in an attempt to exhaust administrative remedies must name the individual subjects of the grievance so prison officials can address the claims before a suit is filed in federal court. *Curry v Scott*, 249 F.3d 493, 505 (6th Cir. 2001).

In his Complaint, Plaintiff states that he filed the necessary grievances, providing dates on which such grievances were filed, but he only states that the grievances "cit[ed] each instant in which [sic] plaintiff is alleging in this complaint." Compl. at 2. Plaintiff does not explain the specific issues raised by the grievance or why the grievance and its appeals were denied. This explanation is required, so that the Court can make a finding concerning the exhaustion requirement.

That Plaintiff attached the Step I grievance and the Step II and III appeals to his responses to the motion to dismiss, does not satisfy the exhaustion requirement. The *Baxter* court held that a prisoner cannot satisfy the exhaustion requirement by amending his complaint. *Baxter v Rose*, 305 F. 3d at 489. Further, the documentation regarding grievances supplied by the Defendants as part of their motion to dismiss does not cure Plaintiff's failure to properly plead exhaustion. The burden of production and proof is on the prisoner. And, the PLRA establishes a unique procedure under which the court, not the parties, is required to evaluate whether a claim on which relief can be granted has been set forth in the complaint. "Courts would be unable to screen cases effectively if plaintiffs were able, through, ambiguous pleading, to avoid dismissal of claims on which relief could not be granted." *Baxter*, 305 F. 3d at 490.

Based on the foregoing, the Court finds that Plaintiff's claim against these two Defendants must be dismissed as well, for Plaintiff's failure to state a claim upon which relief can be granted. The Court need not reach Defendants' argument that Plaintiff's Complaint must be dismissed for his failure to totally exhaust all claims. Judgment is to enter against Plaintiff in favor of all Defendants.

IT IS SO ORDERED.

/s/ Victoria A. Roberts
Victoria A. Roberts
United States
District Judge

Dated: Sep. 25, 2003

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LORENZO JONES,

Plaintiff,

vs

Case No: 02-74336
Honorable Victoria A. Roberts

WARDEN BOCK, ET AL

Defendants. /

JUDGMENT

(Filed Sep. 25, 2003)

In accordance with the Order entered on SEP 25 2003, **IT IS ORDERED** that Judgment is entered in favor of all Defendants.

Dated at Detroit, Michigan on SEP 25 2003.

David J. Weaver Clerk of the Court

David J. Weaver
Clerk of the Court

BY: /s/ Linda Vertrust

Approved:

/s/ Victoria A. Roberts
Victoria A. Roberts
United States
District Judge

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
File Name: 05a0506n.06
Filed: June 15, 2005

No. 03-2576

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

LORENZO L. JONES, *Plaintiff-Appellant,*	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN
v.	)	
BARBARA BOCK, Warden, et al., *Defendants-Appellees.*	)	**OPINION**

BEFORE: BATCHELDER and COLE, Circuit Judges; REEVES, District Judge*

PER CURIAM. Plaintiff-Appellant Lorenzo Jones appeals a district court order dismissing his action brought pursuant to 42 U.S.C. § 1983 for violations of the First, Eighth, and Fourteenth Amendments of the United States Constitution. For the reasons that follow, we **AFFIRM** the judgment of the district court.

I. BACKGROUND

On November 14, 2000, Plaintiff-Appellant Lorenzo Jones sustained serious injuries from a motor vehicle

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* The Honorable Danny C. Reeves, United States District Judge for the Eastern District of Kentucky, sitting by designation.

accident while he was in custody of the Michigan Department of Corrections. Jones alleges that after the accident, various prison officials required him to complete tasks which aggravated his injuries. He argues, *inter alia*, that this action constituted deliberate indifference to his serious medical needs in violation of the Eighth Amendment of the United States Constitution. The defendants sought dismissal of the complaint based on Jones's failure to exhaust administrative remedies as required by the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (1996) ("PLRA"), codified at various sections of 28 and 42 U.S.C. The district court granted the motion. This appeal followed.

II. ANALYSIS

The district court did not err in dismissing the claims against the prison officials based on Jones's failure to exhaust his administrative remedies. The PLRA requires plaintiffs to exhaust all administrative remedies before bringing an action in federal court regarding prison conditions. 42 U.S.C. § 1997e(a). This Circuit follows the "total exhaustion" rule, meaning that we must dismiss a complaint for failure to exhaust administrative remedies whenever there is a single unexhausted claim, despite the presence of other exhausted claims. *See Bey v. Johnson*, 407 F.3d 801, 806 (6th Cir. 2005) ("We now join the Tenth and Eighth Circuits in holding that total exhaustion is required under the PLRA."). An action is one regarding prison conditions where it arises under federal law and concerns, *inter alia*, the "effects of actions by government officials on the lives of persons confined in prison." 18 U.S.C. § 3626(g)(2).

This Court has held that in order to meet the exhaustion requirement of the PLRA, a prisoner must either attach a copy of his prison grievance forms to the complaint or state the nature of the remedies pursued and the result of each process. *See Knuckles-El v. Toombs*, 215 F.3d 640, 642 (6th Cir. 2000). Jones stated in his complaint that he had exhausted his administrative remedies. However, he neither attached the grievance forms to his complaint nor described the remedies he pursued and the outcome. The fact that the defendant later provided evidence that Jones may have exhausted some of his claims is irrelevant under the PLRA and Sixth Circuit precedent. *See Baxter v. Rose*, 305 F.3d 486, 488-90 (6th Cir. 2002). Furthermore, even if Jones had shown he had exhausted some of his claims, the district court properly dismissed the complaint because Jones did not show that he had exhausted all of his claims. *See Bey*, 407 F.3d at 806. Accordingly, Jones's prison-conditions claim was properly dismissed as he did not comply with the exhaustion requirement, as defined by this Court's precedent.

III. CONCLUSION

For the preceding reasons, we **AFFIRM** the judgment of the district court.

U.S. District Court
Eastern District of Michigan (Detroit)
CIVIL DOCKET FOR
CASE #: 2:02-cv-75133-DPH-VMM

Williams v. Overton, et al

Date Filed	#	Docket Text
01/07/2003	3	COMPLAINT (cm) (Entered: 01/07/2003)
		* * *
01/29/2003	13	ORDER by Judge Denise Page Hood, referring all non-dispositive matters to Magistrate Judge Virginia M. Morgan and all dispositive motions for report and recommendation [EOD Date 2/3/03] (lg) (Entered: 02/03/2003)
		* * *
02/27/2003	20	MOTION by plaintiff Timothy Williams to amend complaint [3-1] in order to add new defendants and bring clarity to the complaint; with exhibit and proof of service (jg) (Entered: 03/06/2003)
		* * *
04/11/2003	26	RESPONSE by defendants to motion to amend complaint [3-1] in order to add new defendants and bring clarity to the complaint [20-1] with proof of service (kg) (Entered: 04/14/2003)
04/15/2003	27	MOTION by Bonnie Peterson, Mary Jo Pass, Markwell, P. Klee, D. Jamrog, William Overton to dismiss, for summary judgment with brief, exhibits A and B, affidavit and proof of service (kg) (Entered: 04/18/2003)

* * *

05/07/2003	32	ORDER by Magistrate Judge Virginia M. Morgan denying motion to amend complaint [3-1] in order to add new defendants and bring clarity to the complaint by Timothy Williams [20-1] [EOD Date 5/15/03] (cm) (Entered: 05/15/2003)
05/20/2003	33	RESPONSE by Timothy Williams to motion to dismiss by defendants [27-1], motion for summary judgment by defendants [27-2] with attachments and verification of service (lg) (Entered: 05/28/2003)

* * *

07/22/2003	37	REPORT and recommendation by Magistrate Judge Virginia M. Morgan that motion to dismiss [27-1] and motion for summary judgment by defendants [27-2] be granted; and the complaint [3-1] be dismissed [EOD Date: 7/23/03] (jg) (Entered: 07/23/2003)

* * *

09/25/2003	40	OBJECTIONS by plaintiff Timothy Williams to report & recommendation [37-1]; with appendix and proof of service (dp) (Entered: 09/25/2003)
10/31/2003	41	ORDER by Judge Denise Page Hood accepting report & recommendation [37-1] granting motion to dismiss [27-1] and granting motion for summary judgment by defendants [27-2] and dismissing complaint without prejudice with proof of service [EOD Date 11/4/03] (nh) (Entered: 11/04/2003)

10/31/2003	42	JUDGMENT entered by Judge Denise Page Hood for defendants against plaintiff, with proof of service [EOD Date: 11/4/03] (nh) (Entered: 11/04/2003)
11/10/2003	43	APPEAL by plaintiff Timothy Williams of orders [42-1] and [41-1] to USCA-FEE: not paid (do) Additional attachment(s) added on 2/6/2004 (LBeh,). (Entered: 11/14/2003)

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General Docket
US Court of Appeals for the Sixth Circuit
#03-2507

Williams v. Overton

11/21/03	Prisoner Case Docketed. Notice filed by Appellant Timothy Williams. Transcript needed: n (jts)
	* * *
1/2/04	BRIEF filed by Timothy Williams for Appellant Timothy Williams. Copies: 07. Certificate of service date 12/28/03 Number of Pages: 16 ++appendices. [03-2507] (rgf)
	* * *
2/17/04	BRIEF filed by H. Steven Langschwager for Appellee William Overton. Copies: 07. Certificate of service date 2/10/04.
	* * *
3/26/04	APPENDIX filed by H. Steven Langschwager for Appellee William Overton. Copies: 05-400 pages. Certificate of service date 3/25/04 [03-2507] (rgf)
	* * *
12/21/04	CAUSE SUBMITTED on briefs to panel consisting of Judges Gibbons, Sutton, Edgar sitting on 2/03/05. [03-2507] (kal)
	* * *
6/22/05	OPINION filed: AFFIRMED the judgment of the district court. [03-2507],

	decision not for publication pursuant to local rule 28(g) [03-2507]. Julia S. Gibbons, Authoring, Circuit Judge, Jeffrey S. Sutton, Circuit Judge, R. A. Edgar, District Judge (E/TN). (jts)
	* * *
7/14/05	MANDATE ISSUED with costs to be recovered by Appellee William Overton. Amount: $718.50. [03-2507] return record (rgf)
	* * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
Theodore Levin United States Courthouse
231 W. Lafayette, Room 564
Detroit, Michigan 48226
02-75133
Denise Page Hood
Magistrate Judge Morgan

Prisoner Civil Rights Complaint for Cases Brought Under 42 U.S.C. § 1983

(Filed Jan. 7, 2003)

Plaintiff's Information			
Name Timothy Williams-el	Inmate Number 173396		
Place of Confinement Gus Harrison Correctional Facility A.R.F.			
Street 2727 E. Beecher St. P.O. Box 1888	City Adrian	State Michigan	Zip Code 49221

Any additional plaintiffs to this action should be listed on a separate 8½ x 11" sheet of paper and securely attached to the back of this complaint. Please provide names, inmate numbers, and addresses for each plaintiff.

Defendant's Information ***(This information must be current.)***		
Name William Overton, et al.	Position Director, MDOC	
Street or P.O. Box Number P.O. Box 30003,		
City Lansing,	State Michigan	Zip Code 48909

Are you suing this defendant in his/her personal capacity, official capacity, or in both capacities?

☐ Personal ☐ Official ☒ Both

Any additional defendants to this action should be listed on a separate 8½ x 11" sheet of paper and securely attached to the back of this complaint. Please provide their names, positions, and current addresses, and the capacity (personal or official) in which you are suing the defendants.

I. PREVIOUS LAWSUITS

Have you begun any other lawsuits in state or federal court relating to your imprisonment?

YES ☒ NO ☐

If "YES", complete following section; if "NO", proceed to Part II.

- ***Please list all prior civil actions or appeals that you have filed in federal court while you have been incarcerated.***[1]

1)	*Docket Number:* Civil No. 98-CV-74042
	Name of Court: Eastern District of Michigan
	Parties (Caption or Name of Case): Williams-el-173396 V. B. McLemore, et al,
	Disposition: Pending

2)	*Docket Number:*
	Name of Court:
	Parties (Caption or Name of Case):
	Disposition:

[1] This notification is pursuant to 28 U.S.C. § 1915(g).

3)	*Docket Number:*
	Name of Court:
	Parties (Caption or Name of Case):
	Disposition:

Note: Any additional civil actions should be listed on a separate 8½ x 11" sheet of paper.

II. ADMINISTRATIVE REMEDIES

1. If you are in the custody of the State of Michigan or one of its subdivisions, did you:

File a grievance with the Step 1 Grievance Coordinator:	YES ☒ NO ☐
Appeal to the Step 2 Grievance Coordinator?	YES ☒ NO ☐
Appeal to the Step 3 Grievance Coordinator?	YES ☒ NO ☐
Seek a rehearing?	YES ☐ NO ☒
Seek State Circuit court review of a misconduct hearing?	YES ☐ NO ☐

If you did not take one or more of the steps, please explain why:

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2. If you are a federal detainee, prisoner, or parolee and if your claim concerns parole, did you appeal to the National Appeals Board of the United States Parole Commission?

YES ☐ NO ☐

If not, explain why:

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3. If you are a federal detainee, prisoner, or parolee, and if your claim involves something other than parole, did you:

Attempt to resolve your complaint informally?	YES ☐ NO ☐
File a formal complaint?	YES ☐ NO ☐
Appeal to the warden?	YES ☐ NO ☐
Appeal to the Regional Director of the Bureau of Prisons?	YES ☐ NO ☐
Appeal to General Counsel for the Bureau of Prisons?	YES ☐ NO ☐

If not, explain why:

III. STATEMENT OF FACTS

State here as briefly as possible the facts of your case. Describe how each defendant is involved. Include the names of other people, dates, and places involved in the incident. Do not give any legal arguments or cite any cases or statutes. If you intend to allege a number of related claims, number and set forth each claim on blank 8½ x 11" sheets of paper and attach them to the last page of this complaint.

See Attached

IV. RELIEF

State here briefly and exactly what you want the Court to do for you.

See Attached

I declare under penalty of perjury that the foregoing is true and correct.

December 13, 2002 (Date) /s/ Timothy Williams (Your Signature)

1. The plaintiff, Timothy Williams-El, #73396, was incarcerated at Standish Maximum Correctional Facility (S.M.F.), located at 4713 West M-61; Standish, Michigan 48658. This plaintiff is currently being held at Gus Harrison Correction al Facility [level II (A.R.F.)]. The majority of plaintiff complaints occurred while being incarcerated at this facility.

2. Defendant, Williams Overton, the Director of Michigan Department of Corrections is responsible for the overall operation of this agency (M.D.O.C.). Plaintiff believes he is a, liable in both his official and individual capacity.

3. Defendant, Dr. Pramstaller, is the Regional Medical Officer for the Bureau of Health for the Michigan Department of Corrections (CMS). Defendant, office is located at 2378 Woodlake Drive; Okemos, Michigan 48864. Defendant an employee for the Medical Service, is responsible for ensuring the provision of adequate medical care. Dr. Pramstaller, has constantly evade plaintiff request to see a medical specialist. Defendant ineptness has cause plaintiff

unnecessary hardship and pain, this is due to its prolonging of medical treatment and it has continuous stagnate by not allowing the plaintiff the medical service of needed surgery. On August, 30, 2002, Dr. Pramstaller, agreed with this plaintiff that plaintiff's ongoing pain stems from the contracture in his muscles. This doctor acknowledge the only solution to controlling the spreading of the tumors it must be control by tendon lysis. Plaintiff was also informed by Defendant that he was going to seek the advice and opinion of another specialist. Plaintiff haven't been forward or discuss with the plaintiff. Two months has elapse since Dr. Pramstaller, has had in his possession valuable information concerning the outside specialist medical opinion. As the result of waiting patiently for a response plaintiff tumors has spread tremendously since Dr. Pramstaller had posses the information fax to his office on October 2, 2002. Dr. Pramstaller, original fax to the specialist was sent August 30, 2002. No treatment has been provided to this plaintiff as the result of this specialist professional opinion. Therefore, at this moment, this plaintiff is suing this defendant in both his individual and official capacities for his failure to treat this plaintiff medical condition.

4. Defendant, D. Jamrog, the Warden of ~~Adrian~~ [Parr Highway Correctional Facility 2727 E. Beecher, Adrian, MI 49221] (A.T.F.) is responsible for the institutional operation and the function of the facility. He is also responsible for enforcing and making sure that every department under his supervision enforce and follow the procedures governed by policy. His duties are intertwine with authority to providing adequate medical care. These departments are obligated to insure that it implement polices and provide medical care to its population. The

Michigan Department of Corrections does not tolerate any systematic denial of medical care. Mr. Jamrog liable in both his individual and official capacity.

5. Defendant, P. Klee, ADW of Housing, is a subordinate of Defendant D. Jamrog, who is employee at the Gus Harrison Correctional Facility, located at 2727 E. Beecher St.; P.O. Box 1888; Adrian, Michigan 49221. This defendant is being sued in both individual and official capacity.

6. Defendant, Mr. Markwell, who is employed as an Unit Corrections Officer at Gus Harrison Correctional Facility, located at 2727 E. Beecher St.; P.O. Box 1888; Adrian, Michigan 49221. Defendant works under the supervision of Defendant's D. Jamrog, and P. Klee. Defendant is being sued in both his individual and official capacity.

7. Defendant, Mary-Jo Pass, works in the capacity of Asst. Deputy Warden of Programs at Gus Harrison Correctional Facility, located at 2727 E. Beecher St.; P.O. Box 1888; Adrian, Michigan 49221. She is a subordinate of Defendant D. Jamrog. This defendant is also being sued in both her individual and official capacity.

8. Defendant, Bonnie Petterson, the Health Facility Manager of Gus Harrison Correctional Facility oversees health care. Defendant department local is located at 2727 E. Beecher St.; P.O. Box 1888; Adrian, Michigan 49221. She as well is being sued in both her individual and official capacity.

9. All the above mentioned defendant's have acted unprofessional and they have continue to exemplify these tactics in the handling of these matters. The color of state and federal law was violated by the Defendant's creating unconstitutional tactics and procedures. Plaintiff is making this

complaint because the defendant's has failed to provide the plaintiff with adequate medical service.

10) PRELIMINARY STATEMENT:

This is a Civil Rights Action filed by Timothy Williams-El, #173396, a state prisoner, for damages and injunctive relief under 42 U.S.C. 1983, alleging that while in the care of the Michigan Department of Corrections (MDOC) and specifically housed at Gus Harrison Correctional Facility (ARF); that the contract service provider for Health Care (H/C), alone or in conjunction with (MDOC) and (ARF) have failed to deliver services of a medical nature to this Plaintiff.

11) Resulting in *Irreparable Harm*. The care offered and provider is patently, insufficient to remedy the need which can only be met through surgery and rehabilitative therapy and accommodations single cell.

12) The medical reports show several evaluations, all indicating and recommending the surgery and therapy, brace etc. They show corrections medical service (CMS) denying this in a grossly, negligent manner with no real justification, simply listing "Not enough information provider" and "where is the old brace," etc.

13) That these to match the MDOC policy mandate care, which is to mirror community standards.

14) That in my particular case, we know these community standards are as I was evaluated by a community doctor who specialized in my care, at the St. Joseph Medical Facility which specializes in Hand surgery of this type.

15) That CMS form (CHJ-408) dated March 25, 2002; mentions in a disingenuous and fallacious manner, in CMS's decision space, ". . . the dictated note indicates the hazards of this and the probable futility of it. . . . Hand surgery reveal will accomplish nothing. . . ." This is utterly shocking and alarming, giving the specific mandates the MDOC must by federal law and U.S. Constitution function under.

16) The CMS shows an undeniable set of facts, that either the CMS's "decision" person(s) in ignorant of current community standards and humane decency; or that they are only concerned with money; or that they are ignorant of medical care all together? And in reality, any choice they list is condemning to them, and violative of the U.S. Constitution prohibition on Cruel and Unusual Punishment.

17) As to my hand, first, the defendants should use common-sense and the record by the doctors and specialist show real and positive benefits to the surgery on the hand (and do not loose sight of the needs for arm's surgery)! And these positive benefits include, but are not limited to: (A) reduction of pain; (B) The hand being flexible void of pain, thus resulting in a more natural look, and the fact it will be of some use and assistance real in "ADL's". For the record, this condition effects my ADL's gravely in a very negative manner!

18) As to the disingenuous note of "futility," the above shows the falsehood thereof, and as for the comment of "hazards of this" surgery, they are not numerically listed, and even having your tonsils out poses real "hazards."

19) I contend that to have the specialists at the Hand Surgery Clinic perform the needed surgery to reduce pain

and add functionality and usability of the hand is minimal at best, as all persons know the listing "hazards" is a precaution.

20) That the obvious ignorance of medical practices and of English language by this respondent whom denied this request, fails to see, and again, (A) the listing of pain; (B the positive benefits of this surgery. Thus, Dr. Hoffman, in an animated reply states in large print and with underlining (out of sheer disbelief and great frustration). "AGAIN the request is to have surgery to relieve *PAIN* NOT (just) *correction* of the *hand" so court should see the crime and ignorance and conspiracy,* the real constitutional violate practice herein by CMS and MDOC!

21) In step-one reply of denial, CMS again is disingenuously listing that the surgery is futile and "dangerous," this based not upon any real facts, not upon any statistics, but upon mis-application of the standard precautions. Any standard of care is highly successful care where precautions are routinely listed!

22) That Correction Medical Services (CMS) Dr. G. Pramstaller (all others in both parties John & Jane Doe's at present). Spins and denies my needed care. I suffer from a multitude of injuries relating from the tumors, real physical ones, mental ones and emotional ones. This is not policy compla.nt to either the humane living conditions and treatment policy, not any of the Medical Policies. I grieved per right of the alleged violation of my "condition of confinement."

23) The respondent at step-three states that "the medical opinions from professionals, such as doctors and nurses, will not be questioned by this office due to the technical

expertise of the profession. (see Grievance 3rd step SMF-02-06-1337-12d exhibit ["A"]).

24) That "deliberate indifference to serious medical needs of prisoners" is cruel and unusual punishment. The complaint alleges facts that state a constitutional claim under this standard.

25) The need of Surgery and Therapy!

Mr. Williams-El, being a qualified individual with a handicap under the ADA, needs surgery to relieve immense pain and suffering, and to straighten a wrist, then to receive therapy as determined by Medical Expert Surgeon Khawaja H. Ikram, D.O. #10193 and also of K. Nimar Ikran, D.O. #11103 from DWH, Dr. J. Hoffman, D.O., from SMF; and Doctor Raymond C. Noellert, M.D./cak of the

26) ACCESS TO CARE PROSCRIBED

Plaintiff has attached documents (medical papers) as exhibits to show this Court that the defendant's could have provided plaintiff with medical assistance if they would have sought this option. Instead, of doing so they choose to squabble over words. Defendant's own medical staff presented enough plethora of paperwork that proves that plaintiff medical condition can only be cure if plaintiff had a surgery and follow-up treatment of therapy.

27) Defendant's behavior of "in fighting" between the Department of Correction and the separte entity of the agency the Medical Service Provider shows a willful and disregard and reckless use of treatment for the plaintiff. These methods caused plaintiff from not receiving a reasonable health care.

28. The delays exhibit by the defendant's cause serious risks to the plaintiff. These delays are unnecessary because they are the ones who authorized and performed the surgery on plaintiff hand on March 29. 2001. These same defendant's will not approved another surgery which is validated by the medical files.

29) Plaintiff has sustained other injuries as a result of the delays and denial of proper treatment. Plaintiff has incurred the following injuries in respect to:

A. Permanent damages due to the growing tumorous which has cause the tendons and ligaments in the wrist to become rigged and the arm shorten in length. Also, atrophy of the hand, wrist, and forearm muscles. There is some clarification of the muscles as well. If not properly treated more severe injury will occur if not treated.

B. Plaintiff has suffered continuous pain and myriad of effects from the loss of activity, loss of sleep resulting in no quality of life, ect.

3. Plaintiff has suffered emotional and mental stress.

4. Plaintiff has been subjected to humiliation, degradation, and his constantly fear knowing the condition is getting worse (deformities). The *community orthopedic surgery & huron valley hand surgery* clinic, all support this surgery, have done evaluations and/or approved of and performed this surgery prior. Please see the attached exhibits on the matter, they are comprehensive, show the success of the prior similar surgery, the recommendations for this presently delayed surgery, the failed approval via CMS for it, and more.

> Plaintiff asks this Court to enact its powers to forego further proceedings, as defendant's decision to deny surgery for the relief of pain and straightening of wrist and hand, is so egregious as to "shock the conscience" of an evolving society, and the evolving medical standards of that society. Plaintiff asks this Court to rule immediately, as the decision to deny surgery and therapy is so palpably and grossly violative of fact and logic that it evidences perversity of will, defiance of judgement and an exercise of perverse passion. There was a hearing held, without me present, with Dr. Pramstaller and other staff of the MDOC and CMS in which the decision was to deny the surgery. Thus, this Administrative Hearing has resulted in harm to me.
>
> intervening or participation in this matter.

30) The defendant's are required to follow polices, rules, regulations and honor the laws of the State of Michigan and United States of America by acting accordingly.

31) On March 29, 2001, surgery was performed on the plaintiff to removed the Tumors (Hemangioma). This was his first surgery and it was successful. See Exhibit ["B"] attached.

32) On August 8, 2002[1], went to Duane L. Water for a follow-up care surgery. The physician decided to remove Tumors (Hemangioma) from both finger and hand. Hoping to detour the wrist from curving back into the immobile position. And to provide a better extension (straighten the wrist). See Exhibit "C" attached.

33) On October 23, 2001, Plaintiff was referred to a physical therapy pending surgery. Therapy recommended a hand and arm brace. See Exhibit D attached.

34) On January 11, 2002, Plaintiff, was recommended and referred to see an outside specialist at St. Josephs Hospital located in Ann Arbor, Michigan. Dr. K. Nimr Ikram, D.O. #1103 supposed to been the specialist. See Exhibit "E" attached.

35) On January 29, 2002, a referral too see Dr. Nollert a Hand Specialist was approved. See Exhibit "F" attached.

36) On March 5, 2002, Plaintiff was evaluated by Dr. Nollert (M.D.) at the Orthopedic clinic, at St. Josephs Hospital in Ann Arbor, Michigan. Dr. Noellert, recommended surgery and he also explained to the plaintiff that he can correct the arm by extending plaintiff wrists. Which will relieve the ongoing pain from occurring again. See Exhibit "G" attached.

37) On March 25, 2002, after receiving the evaluation by Dr. Noellert. C.M.S. on March [25] 2002, denied the recommendation by Dr. Noellert that surgery can correct the problem. Dr. Hoffman at Southern Michigan Facility (S.M.F.) appealed C.M.S. decision denying surgery. He felt as well that this surgery is necessary. See Exhibit "H" attached.

38) Plaintiff medical need is a serious matter where certain physicians has agreed that surgery is require. These are the following doctors who agreed with the surgery: Dr. J. Hoffman; Khawaja H. Ikram, [D.O. #10193 (Medical Expert)]; Dr. K. Nimar Ikaram, [D.O. #11103 (Medical Expert)]; Dr. Raymond C. Noellert, [M.D./CAK] Hand Surgery Specialist at Community Orthopedic at St. Josephs Hospital.

39) Defendant's Dr. Pramstaller, Correctional Medical Services have deliberated cause indifference to a serious

medical need. The parties involved are John Engler (Governor of Michigan) and Jane Doe(s). All defendant's which are mentioned in this action suit because they have prevented Plaintiff from receiving the recommended medical treatment.

A.D.A. VIOLATION

40) Plaintiff is alleging that the official [defendant's] at Adrian Correctional Facility (A.R.F) denied him the right to a handicap cell (single). The failure to comply to plaintiff reasonable request of adequate living condition which would increased plaintiff mobility and protect him from injuries violates his constitutional rights. Such discrimination procedures implemented by this facility is inhumane.

41) On August 7, 2002, plaintiff was transferred to A.R.F. where Defendant Jamrog is the Warden. Plaintiff, sent a request seeking addition Special Accommodations to his office in which it was denied. Therefore, plaintiff sought administrative relief by filing a grievance. Plaintiff, grieved the matter through step 1 to step 3, but it was to no avail. See attached Exhibit "I" [ARF-02-08-1417-28H (Grievance Identifier Number)].

42) On and about August 3, 2002, Plaintiff received a response from Mary Jo-Pass (defendant) the Assistant Deputy Warden of Program concerning plaintiff request for A.D.A. treatment. In her memo dated August 30, 2002, it states as following, "a review of your medical files indicates a current special accommodation notice. I spoke with (ARUS) Beecher about this accommodation and your should received those things as listed through his office. Further, a work order has been submitted to have maintenance extend the length of time, the faucets run, when

pushed. If you have any questions or concerns, feel free to 'kite me'". On September 4, 2002, plaintiff request of A.D.A treatment, Plaintiff submit in writing, outlining all his disabilities on standard "Prisoner Accommodation" form (CAJ-707). Defendant called plaintiff out on September 9, 2002, to discuss the problems and discuss any miscommunication between the parties. Out that meeting she still concluded that I do not meet the qualification of being place in a handicap single cell. Plaintiff sought administrative relief on this matter, but as usual this administration agreed with the previously decision. See attached Exhibit 'J' [Grievance Identifier Number: ARF-2002-09-1509-28H].

43) After returning from the meetimng with Ms. Mary Jo-Pass, I brought this complaint to the Unit A.R.U.S. (Mr.M. Risley) and discussed the meeting I had with Ms. Mary Jo-Pass. In our conversation plaintiff directed his attention to prisoner's Guidebook, page 26, where Director of (MDOC) William Overton stated, "a prisoner should make a request for a reasonable accommodation to the Unit Manager or the Department (A.D.A.) coordinator in Lansing, located at P.O. Box 30003, Lansing, Michigan 48909." Case Manager (Unit A.R.U.S.) Mr. M. Risley acted appropriate under the circumstances and moved the plaintiff to a handicap (single) cell. Plaintiff still pursued with the filing the grievance on Mary Jo-Pass (Defendant) for failure to act accordingly. See attached Exhibit 'J' dated September 9, 2002.

44) The following day (09-09-02), Unit Officer (Defendant) Markwell made a statement to the plaintiff in a derogatory, and demeaning way. He stated: "How in the fuck you get a handicap cell and who assisted you." He further stated, "There's nothing wrong with you, you are

capable of assisting your fucken-self." This defendant's remarks were humiliating and degrading, were meant to harm this plaintiff. Plaintiff sought grievance procedure against this defendant. See attached Exhibit 'K' [Grievance Identifier Number: ARF-02-09-1507-28C].

45) Plaintiff believes Officer Markwell (Defendant) intentionally interfered with plaintiff health and Case Manager Mr. M. Risley decision to place him in a handicap (single) cell. Officer Markwell (Defendant) contacted Health Care Service and proceeded up the local administration (A.R.F.) to Deputy of Housing (Mr. P. Klee) to have the plaintiff moved out of the handicap cell [131 to 157-B-3] to a non handicap cell. Both Defendants (Mr. Markwell and P. Klee) conspired together to intentionally causing plaintiff duress, mental anguish, and physical pain. Their actions interfered with the MDOC Director's *mandate* and Case Manager Mr. M. Risley decision to accommodate this plaintiff. [See attached Exhibit 'L' Grievance Identifier Number: ARF: 02-09-1508-28H].

Facts:

46) On September 18, 2002, plaintiff tried to resolved this matter by making a formal request to Health Care Service. Plaintiff presented information to Ms. Bonnie Petterson via kite system. Ms. Petterson substantiated her position by stating: "Only wheelchair prisoners are entitled to a (single) handicap cell. Plaintiff filed an administrative grievance against this defendant. See attached Exhibit 'M' [Grievance Identifier Number: ARF-2002-10-1646-121-I].

47) Plaintiff has made good faith effort by attempting to resolve this matter via letters (kites), medical kites, and

the filing of grievance. As of result, no suitable remedy were provide in the administrative process.

48) All of the above named defendants were fully aware of plaintiff being handicap. They even acknowledged that plaintiff situation does fall within the category of being legally handicap under the A.D.A. standard. But in their own opinion, they felt that plaintiff isn't entitled to those benefits. Every defendant pertaining to this matter failing to do anything to resolve this matter. See attached Exhibits [Special Accommodation dated 1997 thru 2002, (form attached)]. 1-10.

49) On or about October 20, 2002, plaintiff was injured by his cell-mate. His cell-mate accidentally slammed into plaintiff's entire arm and hand. Which has caused plaintiff to developed new tumors. See attached Exhibit '9' (Health Care Kite). After suffering injuries to the arm and hand that has been classified as handicap by the medical profession. Plaintiff, still hasn't been placed in a handicap (single) cell after suffering an injury. Plaintiff further believes the lack of mobility of living in a double-bunk cell, plaintiff's cell-mate caused the injury.

50) The defendant failure to provide plaintiff with the proper living condition and medical treatment had caused him physical, emotional and mental stress. Also, defendant's failure to make a speedy respiration has caused the plaintiff more injuries.

Claim For Relief

The failure of defendant's William Overton; Dr. Pramstaller, head of Correction Medical Services (CMS), Jan Epp, head of Bureau of Health Care Service; at 3400

Cooper St.; Jackson, Michigan 49201 and C.M.S. John and Jane Doe's has been determined to be responsible for their *Deliberately Indifferent* of complete denial and delays tactics in prescribing surgery, therapy, and follow-up care. Which has caused plaintiff to have suffer both physically and mentally with emotional defects. Their deliberate indifference to the plaintiff cause serious medical needs not to be attend to. Thus, violating the Eight and Fourteenth Amendment of the U.S. Constitutions. Plaintiff believes the defendant's actions shall be construe as Negligence and Malpractice. Any doctor/nurse working as a skill professional is liable for malpractice (misconduct) due to their practice of medicine.

The failure of defendant's D. Jamrog, (Warden), Bonnie Petterson, (Health Manager), Mary Jo-Pass, (A.D.W. of Programs), and John and Jane Doe(s) should be determined to be responsible for their deliberate indifferent acts of discrimination that was based on Plaintiff's disability. This plaintiff was also denied of all the benefits of adequate services and the denial of single handicap cell. Due to these denials has cause plaintiff to he subjected to injuries of physical, mental, emotional distress. Which is the result of the denial medical treatment (special accommodations) that constitutes deliberate indifference. Both Eighth and Fourteenth Amendment of the U.S. Constitution provides Equal Protection of the Law. This is also supported by the American Disabilities Act (A.D.A.) and Rehabilitation Act.

The actions of the following defendant's were intentionally exemplify for the sole purpose of interring with Case Manager Mr. Risleys, decision to placing plaintiff in handicap (single) cell. P. Klee (A.D.W. of Housing) and Markwell, Unit Officer (C/O) conspired to together to

obstruct the "course of justice" with the intention of denying Plaintiff equal protection of the law. Thus, violating plaintiff Eighth and Fourteenth Amendment right under the American Disabilities Act (A.D.A.), and Rehabilitation Act.

Relief Requested

Wherefore, Timothy Williams-El, (Plaintiff) request that the Court grant the following relief:

A) Issue of declaratory judgment stating that:

1. The physical abuse of the plaintiff by defendant's Overton, Dr. Pramstaller, (C.M.S.), Jamrog, Petterson, Klee, Markwell, and C.M.S. John and Jane Doe(s) as determined to be responsible for the violating plaintiff rights guaranteed by the Eight and Fourteenth Amendment of the U.S. Constitutions, the American Disabilities Act, and the Equal Protection of Law.

2. Defendant's Overton, Dr. Pramstaller, Jamrog, all failed to take precautionary actions to curb the physical abuse received by this plaintiff. This, is a violations of the Eight and Fourteenth Amendment of the U.S. Constitutions, the American Disabilities Act, and the Equal Protection of Law.

3. Defendant's Overton, Dr. Pramstaller, Jamrog, also failed to provide adequate medical care (single handicap cell) ect. Defendant's violated plaintiff Eight and Fourteenth Amendment of the U.S. Constitutions, the American Disabilities Act, and the Equal Protection of Law.

4. Defendant's Overton, Dr. Pramstaller, Jamrog, failed to act on the information. In the circumstances, where the prisoner has filed a grievance.

The grievance facilitators on many occasion failed to hold the individual responsible where there was a legitimate claim presented by the prisoner. Due to acting appropriately constitutes a TORT NEGLIGENCE under the Michigan Laws.

5. The failure of defendant's Dr. Pramstaller, Corrections Medical Services (C.M.S), and (C.M.S) John and Jane Doe(s) shall be determined responsible for not providing surgery on plaintiff's hand and arm and for not allowing plaintiff to participate in therapy. Therapy is necessary to counteract plaintiff deformities. The failure to provide medical care and treatment constitutes a tort negligence.

B) Plaintiff humbly asks this Court to ISSUE AN INJUNCTION ordering against defendant's Dr. Pramstaller, Overton, or C.M.S. or any of their agents to:

1. Immediately arrange for Plaintiff to have surgery to remove the growing tumors from his fingers, hand, and make sure his wrist and arm is straighten to the point medical requirement. This surgery should been done by Dr. Raymond C. Noellert, M.D. who is qualify as hand specialist at Community Orthopedic Hospital at St. Josephs.

2. That no delays shall be tolerate on part of the defendant's if an order is issue to allow Dr. Raymond, M.D. at St. Josephs Hospital to perform the surgery.

C) Award compensatory damages in the following amounts:

1. Hundred Thousand Dollar ($100,000), jointly and severally against defendant's John Engler (Governor), Overton, Pramstaller, and C.M.S. John and Jane (Doe's) as determined to be responsible for he physical and emotional inures incurred as

the result of defendant's for denying plaintiff surgery and rehabilitation.

2. Hundred Thousand Dollar ($100,000), jointly and severally against defendant's, D. Jamrog, Bonnie Petterson, Mary Jo Pass, for their denial to accommodate plaintiff with a single handicap cell. As result of not being provide this special accommodation I have suffered drastically both physical and emotionally. Defendant's violated plaintiff Eight and Fourteenth Amendment of the U.S. Constitutions, the American Disabilities Act, and the Equal Protection of Law.

3. Hundred Thousand Dollar ($100,000), jointly and severally against defendant's, Klee, and Markwell for intentionally interfering with Administrative Policy when case manager Mr. Risley follow procedures by adhering to plaintiff request of special accommodation (single handicap cell). Defendant's violated plaintiff Eight and Fourteenth Amendment of the U.S. Constitutions, the American Disabilities Act, and the Equal Protection of Law.

D) Grant any relief as this Court deems appropriate.

E) Jury Trial if needed.

The Plaintiff Timothy, Williams-El, requests trial by jury of all issues deems to be triable.

Respectfully submitted,

/s/ Timothy Williams-el

Timothy Williams-El, #173396
Gus Harrison Corr. Fac.
2727 E. Beecher St.
P.O. Box 1888
Adrian, Michigan 49221

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TIMOTHY WILLIAM-EL, #173396
PLAINTIFF

NEW CASE: _____

VS.

WILLIAM S. OVERTON, DIRECTOR ET AL,
DEFENDANTS

_____/

AFFIDAVIT OF MEDICAL CARE

1) I, TIMOTHY WILLIAMS-EL, SO HEREIN AFFIRM THAT I HAVE REASONABLY SOUGHT THE REQUIRED AND YEAH, PRESCRIBED TREATMENT OF SURGERY; THERAPY AND SPECIAL ACCOMMODATIONS VIA THE ADMINISTRATIVE REMEDIES AVAILABLE WITHIN THE MDOC AND CMS. THE ATTACHED EXHIBITS SHOW THIS TO BE TRUE.

2) I HAVE RECEIVED NO POLICY AND NO LAW AND CONSTITUTIONAL COMPLAINT RESOLVE AND CARE; MY CONDITION WORSENS, AND THE PAIN AND ASSOCIATED PHYSICAL, MENTAL AND EMOTIONAL HARM CONTINUE WITHOUT RELIEF AND RESOLVE.

3) I ATTACHED GRIEVANCES WHICH I CERTIFY THAT I HAVE SENT TO STEP ONE, TWO AND THREE, BUT THAT DUE TO THE URGENCY OF THE ISSUE AT HAND (PARDON THE PUN) OF THE REALITY OF THE WORSENING OF THE CONDITION TO MY HAND, WRIST AND FOREARM, THE REAL POSSIBILITY OF IRREPARABLE HARM CONTINUING AND RESULTING FROM THE DELAYS AT PRESENT AND IN THE FUTURE.

4) THAT THE ATTACHMENTS EXHIBITS ARE THERE ON DOCUMENTS; THERE IS NO ISSUE IN DISPUTE UNDER THE LAW; THE

OUTSIDE EXPERT SPECIALIST RECOMMENDS THE SURGERY; THE MDOC'S OWN DOCTORS RECOMMEND THE SURGERY. I NEED THE SURGERY, AND SPECIAL ACCOMMODATIONS, A SINGLE CELL.

5) THAT THE ATTACHED EXHIBITS ARE TRUE COPIES OF THE MICHIGAN DEPARTMENT OF CORRECTIONS (MDOC).

I, TIMOTHY WILLIAMS-EL, SO HEREIN AVER TO THE ABOVE UNDER PENALTY OF PERJURY ON THIS DECEMBER 13, 2002

/s/ Timothy Williams
TIMOTHY WILLIAMS, #173396

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TIMOTHY WILLIAMS-EL,

Plaintiff,

v.

WILLIAM OVERTON, GEORGE PRAMSTALLER, DAVE JAMROG, PAUL KLEE, CHAD MARKWELL, MARY JO PASS and BONNIE PETERSON,

Defendants. /

CIVIL ACTION NO. 02 CV 75133 DT

DISTRICT JUDGE DENISE PAGE HOOD

MAGISTRATE VIRGINIA M. MORGAN

REPORT AND RECOMMENDATION REGARDING DEFENDANTS' MOTION FOR DISMISSAL OR SUMMARY JUDGMENT

(Filed Jul. 22, 2003)

Introduction

This is a *pro se* action based on 42 U.S.C. § 1983. Timothy Williams-El is an inmate in the custody of the Michigan Department of Corrections ("MDOC"). The parties named as defendants in the complaint are William Overton, MDOC Director, David Jamrog, Warden of MDOC's Adrian Correctional Facility; Mary Jo Pass and Paul Klee, MDOC Assistant Deputy Wardens; Chad Markwell, MDOC Resident Unit Officer; George Pramstaller, D.O., Chief Medical Officer of MDOC's Bureau of Health Care Services; and Bonnie Peterson, formerly an MDOC Health Unit Manager.

The complaint contains two claims. Plaintiff alleges that he was improperly denied a surgical procedure and related post-operative therapy to correct a medical problem with his right arm. He also asserts that he was wrongfully denied a single-occupancy cell to accommodate his impairment. (These claims will hereafter be referred to as, respectively, the "Medical Claim" and the "Accommodation Claim.") He seeks declaratory, injunctive, and monetary relief.

Process has been served on all parties except Dr. Pramstaller. The Michigan Attorney General has entered an appearance on behalf of the parties served with process, who will hereafter be collectively referred to as "Defendants."

The complaint was filed on January 7, 2003. In lieu of an answer, Defendants filed a motion on April 15, 2003, seeking dismissal or summary judgment under F.R.Civ.P. 12 and 56, respectively. The Court recommends that the motion be granted.

Discussion

Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . ., subjects . . . any citizen of the United States . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1983.

"To assert a § 1983 claim, a plaintiff must prove that he was deprived of a right secured by the Constitution or the laws of the United States and that the deprivation was caused by a person who was acting under color of state law." *Mays v. City of Dayton*, 134 F.3d 809, 813 (6th Cir. 1998). The sources of the federal right which Plaintiff invokes are Eighth and Fourteenth Amendments to the Constitution, the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, and § 504 of the Rehabilitation Act, 29 U.S.C. § 794(a).

I. Medical Claim

As explained in a report dictated by Raymond Noellert, M.D., and dated March 5, 2002, Plaintiff "has apparently had noninvoluting cavernous hemangiomas in the right upper extremity since birth." Exhibit G of Complaint (the "Noellert Report"). A "hemangioma" is a "congenital anomaly, in which proliferation of blood vessels leads to a mass that resembles a neoplasm." Stedman's Medical Dictionary (26th ed. 1995). Dr. Noellert observed that Plaintiff held his right arm "with the wrist in a tremendously contracted position of nearly 90 degrees, from which it cannot be passively extended." Noellert Report. Plaintiff related to Dr. Noellert that he is "bothered by . . . pain, swelling of the hemangiomas, and . . . tremendous inconvenience from the markedly fixed posture of the hand, and inability to use the hand in any way." *Id.* Dr. Noellert's "impression" after examining Plaintiff was "multiple noninvoluting cavernous hemangiomas right

upper extremity, with secondary wrist joint and musculotendinous digital contracture."[1]

A year prior to Dr. Noellert's examination, in March of 2001, surgery was performed to remove a hemangioma from Plaintiff's right hand. Exhibit B of Complaint. Plaintiff indicated that pain relief was the primary objective of this procedure. *See* Noellert Report ("He recently had an hemangioma . . . removed . . . for an indication of pain.") Plaintiff apparently had similar procedures performed "from birth to age 10." *Id.*

In January of 2002, Plaintiff was evaluated by K. Nimr Ikram, D.O. Dr. Ikram's assessments were "hemangioma of the right hand and forearm," and "flexion contracture of the right wrist." Exhibit E of Complaint. The doctor's "Plan" reads as follows:

> The clinical findings and examination were discussed with the patient. He was asked exactly what he wants with the right arm and he states that he wants the wrist to be straightened and wants the hemangiomas removed. He was told that this would be a large complicated surgical procedure and he may not ever get the function of his fingers back. He states that he wants whatever done to get wrist strengthening and to remove the hemangiomas. The patient was told at this time that considering he wants this last surgery to straighten out his wrist and get function back in his finger, we would recommend that he go to St. Joseph hand surgeons, who deal with

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[1] Plaintiff explained to Dr. Noellert that "he has a condition called Kasabach-Merritt syndrome." Noellert Report. Dr. Noellert does not explicitly accept or reject that diagnosis.

> this on a daily basis. The patient agrees and will go to . . . St. Josephs.

Id.

It was with Dr. Ikram's referral that Plaintiff was seen by Dr. Noellert in March of 2002. The report from Dr. Noellert concludes:

> Any type of surgical correction would be a fairly extensive undertaking. It may not be possible to correct his wrist contracture without considering fusion, with proximal row carpectomy. Digital lengthening would likely require something like a superficialis to profundus transfer with step cut lengthening of his wrist flexors. This could be done in association with removal of his hemangiomas. Obviously this is a lot of surgery, with significant potential for infection, skin slough, and nerve or vascular injury. It is even possible that he could lose his hand as a result of attempted treatment. Either [*sic*-even if?] everything goes well, with the posture of the hand being improved, I would not expect much in the way of purposeful digital flexion over strength, with the hand largely functioning as a passive assist.
>
> This was explained at length in detail to the patient today. He is adamant that he understands this and would like to proceed as he simply cannot stand the hand the way it is. On that basis he will receive authorization for treatment.

Noellert Report.

Following Dr. Noellert's examination, the "Medical Service Provider" ("MSP"), J. Hoffman, D.O., reported on March 23, 2002, his conclusion that Plaintiff was "a

candidate for contracture release," and indicated that he would "call for authorization." Exhibit F of Complaint. However, Correctional Medical Services ("CMS") denied permission to proceed with surgical intervention. Exhibit H of Complaint. The explanation for denial was, "functional return of hand is not a known result. Surgery would be cosmetic and dangerous." *Id.* On March 26, 2002, Dr. Hoffman appealed the denial on grounds that "the request is for pain relief, not to regain function." *Id.*

This appeal was rejected with the following notation:

> The patient had hand surgery eval on 3/5/02. The dictated note indicates the hazards of this and the probable futility of it. Literature about this disease was given to the MSP. Hand surgery re-eval will accomplish nothing. If there is some other avenue the MSP wishes to pursue, please submit with supporting documents the rationale of the request.

Id.

On April 8, 2002, Dr. Hoffman again appealed, stressing that "the request is to have surgery to relieve pain, not correction of the hand." *Id.* The CMS indicated in response to this second appeal that the "case will be presented at MDOC MAC meeting." *Id.*

In a memo dated August 30, 2002, Dr. Pramstaller reported that Plaintiff's "request for Hand Surgery . . . was reviewed by the Medical Services Advisory Committee at its August 28, 2002 meeting." Exhibit 7 of Plaintiff's Brief. Based on this review, the memo continues, "the request was . . . pended for more information." *Id.* Dr. Pramstaller directed the memo's addressees – a Dr. Urban and Karen Peters, R.N. – to "call Hand Surgeon and see if

he agrees with position that pain is caused by contracture and the best way to control it is by tendon lysis."

Id.

Dr. Noellert was contacted on October 2, 2002, and his comments were summarized in progress notes as follows: "Staged approach may be tried to relieve pain. First excision hemangiomas, then lysis adhesion if needed." Exhibit 8 of Plaintiff's Brief.

Exhaustion

"No action shall be brought with respect to prison conditions under section 1983 . . ., or any other Federal law, by a prisoner . . . until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997c(a). Prisoners must therefore "exhaust the prison's grievance procedures before filing suit in federal court." *Wyatt v. Leonard*, 193 F.3d 876, 878 (6th Cir. 1999). This means that the prisoner must pursue all levels of appeal provided in the grievance process. *See Hartsfield v. Vidor*, 199 F.3d 305, 309 (6th Cir. 1999); *White v. McGinnis*, 131 F.3d 593, 595 (6th Cir. 1997) *(per curiam); see generally* MDOC Policy Directive 03.02.130 (allowing for an initial grievance (step one) and two levels of appeal (steps two and three) if the prisoner is not satisfied with the response received). Contrary to what Plaintiff asserts, *see* Plaintiffs Brief at 5, 10, the exhaustion requirement applies not only to § 1983 claims, but also to claims based on the ADA or the Rehabilitation Act. *See Lavista v. Beeler*, 195 F.3d 254, 258 (6th Cir. 1999).

Defendants maintain that Plaintiff never filed a grievance against them with respect to the medical claim.

See Defendants' Brief at 4. Plaintiff disputes this contention. *See* Plaintiff's Brief at 5.

The burden is on Plaintiff to demonstrate that he has satisfied the exhaustion requirement. *See Knuckles El v. Toombs*, 215 F.3d 640, 642 (6th Cir. 2000) (". . . a prisoner must plead his claims with specificity and show that they have been exhausted by attaching a copy of the applicable administrative dispositions to the complaint or, in the absence of written documentation, describe with specificity the administrative proceeding and its outcome."). The documentation which he attaches to the complaint does in fact indicate that Plaintiff fully prosecuted a grievance relating to the quality of medical care received for his condition and expressing concern as to when surgical intervention would be authorized. *See* Exhibit A of Complaint.

Defendants do not argue that the foregoing grievance goes to an issue different from the issue Plaintiff is now asserting by way of the medical claim.[2] But they point out

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[2] The grievance states:

> I have requested medical follow-up care, and have not been seen by the doctor, nor have I been treated. I am experiencing a lot of pain from the tumors in my fingers, hand, and arm. My conditions have gotten worst. For example, I am experiencing more pain then ever. I can not open my hand, and the tumors in my fingers, hand, and arm has gotten bigger. I am experiencing nerve pain in my right bicep up my shoulder, and behind my ear and head.

Exhibit A of Complaint.

Plaintiff also refers to an attached "health care kite." *Id.* This is correspondence dated February 6, 2002, and addressed to the "Health Care Director" at the Standish Correctional Facility, where Plaintiff was then incarcerated. *Id.* It states:

(Continued on following page)

that they are not personally identified in the grievance and, citing *Curry v. Scott*, 249 F.3d 493 (6th Cir. 2001), assert that Plaintiff is therefore "precluded from maintaining an action against them." Defendants' Brief at 5.

The plaintiffs in *Curry* alleged that they had been assaulted by a corrections officer, David Scott, at the Southern Ohio Correctional Facility ("SOCF"). *Curry*, 249 F.3d at 497. Among the defendants named in addition to Scott was Darren Howard, another corrections officer, *id.*, whom the plaintiffs claimed "stood by and did nothing while Scott committed these assaults." *Id.* at 498. The district court dismissed the action against Howard for failure to exhaust, as "none of the prisoners complained about Howard's behavior, nor even mentioned Howard in their prison grievances." *Id.* at 504.

The plaintiffs appealed this dismissal, arguing "that requiring prisoners to put forth all legal theories in their grievances imposes an unduly heightened pleading standard on § 1983 plaintiffs." *Id.* They reasoned that "an investigation into Howard's role in the incident would have flowed naturally from, or been encompassed within, even the most general grievance and, accordingly, nothing

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> On 10-23-01 an evaluation was done . . . concerning my Rehabilitation needs . . . . My "immediate concern" now is has my surgery been approved. I know you cannot tell what date it will take place; however it will allow Dr. Hoffman to upgrade my needs.
>
> Also since my most recent evaluation, changes have occurred, such as painful episodes at times of sleep, and feel now while I can tell and describe my symptoms something can be done while waiting.

Id.

beyond the grievances they filed was required to institute administrative proceedings against Howard." *Id.* at 505.

The Sixth Circuit rejected this argument. "The claim against Howard," the court observed, "is a separate claim, against a separate individual, premised on a separate and independent legal theory." *Id.* The purpose underlying the grievance process is "to alert prison officials to problems." *Id.* (citation omitted). "The plaintiffs' grievances may have alerted SOCF to problems with Scott, but they did not reasonably alert SOCF to problems with Howard." *Id.*

Consistent with *Curry*, Plaintiff must satisfy the Court that his grievance clearly and directly implicated each Defendant, even though none of them was mentioned in the grievance. Plaintiff, however, offers no theory as to why prison officials can fairly be said to have been put on notice by his grievance that it was specifically directed at a Defendant.

Nor is it readily apparent that such a connection should have been made by those charged with resolving the grievance. Dr. Hoffman's request for authorization of surgery was not denied by any Defendant. *See* Exhibit H of Complaint. Rather, the request was rejected initially and on appeal by a "R. DeMasi, M.D." *Id.* After a second appeal, it was Dr. Pramstaller who determined that surgery should not be permitted unless and until other measures proved ineffective in relieving Plaintiff's pain. *See supra* p. 6.

In short, there is no sound basis for concluding that the grievance filed by Plaintiff put prison officials on notice that he was faulting any Defendant in connection with the denial of Dr. Hoffman's request. Since the medical claim is predicated on that denial, the Court concludes

that Plaintiff has failed to exhaust his administrative remedies insofar as the medical claim is directed at any Defendants. *See generally Burton v. Jones*, 321 F.3d 569, 574 (6th Cir. 2003) (". . . a prisoner must administratively exhaust his or her claim *as to each defendant associated with the claim*. . . ." (emphasis added)).[3] That claim should therefore be dismissed without prejudice. *See generally, e.g., Brown v. Toombs*, 139 F.3d 1102, 1104 (6th Cir. 1998) *(per curiam)* (Dismissal based on failure to exhaust is "without prejudice.").

Lack of Evidence

Defendants assert that they "are entitled to dismissal" of the medical claim "based on Plaintiff's failure to state a claim." Defendants' Brief at 7. Thus they implicitly invoke Rule 12(b)(6), which calls for dismissal in the event of "failure to state a claim upon which relief can be granted." F.R.Civ.P. 12(b)(6). In responding to Defendants' motion, however, Plaintiff attached various exhibits in support of his position. The Court will therefore assess this argument in accordance with Rule 56. *See*, F.R.Civ.P. 12(b) (A Rule 12(b)(6) motion "shall be treated as one for summary judgment" if "matters outside the pleadings are presented.").[4]

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[3] Plaintiff notes that Dr. Pramstaller "was identified in the Step III part of the grievance" that he filed. Plaintiffs Brief at 6. *See* Plaintiff's Step III Appeal (unmarked exhibit of Complaint). However, the medical claim is not directed solely at Dr. Pramstaller. *See* Complaint at 21-22 & ¶¶ 4-9 & 39.

[4] Although Defendants' motion is supported by affidavits and documents related thereto, this evidence pertains solely to the accommodation claim.

Dismissal of the medical claim is warranted, Defendants assert, because the "Complaint contains no allegations that . . . Pass, Markwell, Klee or Peterson had any involvement with" the refusal to authorize surgical intervention. Defendants' Brief at 6. With respect to Overton and Jamrog, Defendants assert that there has been "no showing of facts supporting a theory of supervisory liability." *Id.* at 7.

In response to these assertions, it was incumbent upon Plaintiff to identify or submit evidence which could plausibly support a finding of liability. *See generally, e.g., Cardamone v. Cohen,* 241 F.3d 520, 524 (6th Cir. 2001) ("Summary judgment is appropriate after sufficient time for discovery if a party who has the burden of proof at trial fails to make a showing sufficient to establish the existence of an element that is essential to that party's case."); *Employers Ins. of Wausau v. Petroleum Specialties, Inc.,* 69 F.3d 98, 102 (6th Cir. 1995) (The party moving for summary judgment "need not support its motion with evidence disproving the nonmoving party's claim, but need only show . . . that there is an absence of evidence to support the nonmoving party's case. . . . The pivotal question is whether the party bearing the burden of proof has presented . . . evidence on which the jury could reasonably find for" that party. (citations & quotation marks omitted)); *Cox v. Kentucky Dep't of Transp.,* 53 F.3d 146, 149 (6th Cir. 1995) ("Essentially, a motion for summary judgment is a means by which to challenge the opposing party to put up or shut up on a critical issue." (citation & quotation marks omitted)). He has not met this burden, as none of Plaintiff's exhibits indicates that any Defendant was personally involved with the decision to deny the surgery request.

Even if not directly and personally involved in the decision to withhold authorization for surgery, a "supervisory official" could still be liable if he or she "at least implicitly authorized, approved, or knowingly acquiesced in" that decision. *Combs v. Wilkinson*, 315 F.3d 548, 558 (6th Cir. 2002). As with the issue of personal involvement, however, there is no evidence to support Plaintiff's position on this point. Defendants are therefore entitled to summary judgment.

A grant of summary judgment on grounds of insufficient evidence generally presupposes that there has been "adequate time for discovery." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). *See also, e.g., Plott v. General Motors Corp.*, 71 F.3d 1190, 1195 (6th Cir. 1995) ("Before ruling on summary judgment motions, a district judge must afford the parties adequate time for discovery, in light of the circumstances of the case."). Plaintiff complains that he has not yet been provided with this opportunity. *See* Plaintiff's Brief at 3.

If the party opposing summary judgment shows by affidavit that "for reasons stated" he is unable to "present . . . facts essential to justify the . . . opposition," the court "may order a continuance to permit . . . discovery to be had." F.R.Civ.P. 56(f). It "is up to the" non-movant "to state why more discovery is needed." *Wallin v. Norman*, 317 F.3d 558, 564 (6th Cir. 2003). Absent a Rule 56(f) affidavit from the non-movant, "there is no justification for the district court's blanket statement that a motion for summary judgment will be premature until the close of discovery." *Id.* Thus Plaintiff must satisfy the Court that his inability to conduct discovery would be prejudicial.

Plaintiff does not make a persuasive case for delaying a decision on Defendants' motion. A party is required by Rule 56(f) to demonstrate "how postponement of a ruling on the motion will enable him . . . to rebut the movant's showing of the absence of a genuine issue of fact." *Emmons v. McLaughlin*, 874 F.2d 351, 356 (6th Cir. 1989) (citation omitted). This of course means that the party must identify "what material facts" it expects to "uncover" through discovery. *Cacevic v. City of Hazel Park*, 226 F.3d 483, 489 (6th Cir. 2000) (citation & quotation marks omitted). Moreover, the factual basis for this expectation must be articulated and reasonably compelling. *Cf. Emmons*, 874 F.2d at 357-58 (In this case, the court faulted the Rule 56(f) affidavit for failing to state "facts that, if they existed, should have been within Appellant's personal knowledge." The court further observed that "mere speculation as to the usefulness" of an "informant's testimony" was "insufficient to justify disclosure of his identity."); *see also, e.g., Duffy v. Wolle*, 123 F.3d 1026, 1041 (8th Cir. 1997) (". . . Rule 56(f) does not condone a fishing expedition where a plaintiff merely hopes to uncover some possible evidence of a constitutional violation." (citation & quotation marks omitted)).

Plaintiff simply expresses a general need for discovery: He does not specify what facts he believes discovery would reveal, why he harbors that belief, and how the facts would warrant denial of Defendant's motion. Plaintiff's professed need to engage in discovery therefore amounts to the kind of "blanket statement" which *Wallin* disapproved. *See also Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 28 F.3d 1388, 1395 (5th Cir. 1994) ("The nonmoving party may not simply rely on vague assertions that additional discovery

will produce needed, but unspecified facts." (citation & quotation marks omitted)).

For these reasons, summary judgment should enter in favor of Defendants notwithstanding the lack of discovery.

Qualified Immunity

"In civil suits pursuant to 42 U.S.C. § 1983 for money damages, qualified immunity protects a public official from being sued as long as the official does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Crockett v. Cumberland College*, 316 F.3d 571, 579 (6th Cir. 2003) (citation and quotation marks omitted). Defendants argues that they enjoy such protection vis-á-vis Plaintiff's Medical Claim. Defendants' Brief at 7-8.

Prior to "addressing the substance of a claim of qualified immunity, the court must first determine whether the plaintiff has stated a claim of a constitutional violation at all." *Skousen v. Brighton High School*, 305 F.3d 520, 527 (6th Cir. 2002). *See also Crockett*, 316 F.3d at 579 (An inquiry into whether a constitutional "right was clearly established" is necessary only if it is demonstrated that the right was in fact violated.). Thus before dealing specifically with the matter of qualified immunity, the Court will consider the merit of Plaintiff's assertion that Defendants' conduct was in violation of the Eighth or Fourteenth Amendment.

The Constitution prohibits "cruel and unusual punishments." U.S. Const. Amend. VIII. It "requires the State to provide adequate medical care to incarcerated prisoners." *DeShaney v. Winnebago County Dep't of Soc. Servs.*,

489 U.S. 189, 198 (1989). "In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). "Deliberate indifference" requires a showing that "the official acted or failed to act despite his knowledge of a substantial risk of serious harm." *Farmer v. Brennan*, 511 U.S. 825, 842 (1994).

There is no sound medical evidence that Plaintiff was subjected to a significant risk of serious harm by the withholding of authorization for surgery. Indeed, the evidence points to the opposite conclusion. While Dr. Hoffman was emphatic on the point that the surgery was for pain relief, *see* Exhibit H of Complaint, Dr. Noellert – the specialist whose recommendation Dr. Hoffman was acting upon – is much more equivocal on the point. Dr. Noellert's report reflects substantial doubt on his part as to whether surgery was advisable, and he indicates that the primary objective would be to improve appearance. *See supra* p. 4. Most important of all, the evidence clearly indicates that Dr. Noellert and prison medical authorities were in agreement that, apart from the potential cosmetic benefits, the need for the requested surgery could be obviated through less drastic measures designed to alleviate Plaintiff's pain. *See supra* p. 6; *see also* Specialty Consult Report (unmarked exhibit of Plaintiff's Brief) (wherein Dr. Hoffman indicates that the surgery is not "urgent"). The record therefore does not reasonably support the inference that prison officials acted with deliberate indifference.

Plaintiff fares no better under the Fourteenth Amendment, which requires "equal protection of the laws." U.S.

Const. Amend. XIV, § I. There is no violation of the Equal Protection Clause absent a showing that prison officials discriminated against Plaintiff on the basis of his disability. *See Copeland v. Machulis*, 57 F.3d 476, 480 (6th Cir. 1995) *(per curiam)* ("In order to establish a violation or the Equal Protection Clause, an inmate must prove that a racially discriminatory intent or purpose was a factor in the decision of the prison officials."); *cf. Hansen v. Rimel*, 104 F.3d 189, 190 (8th Cir. 1997) (stating that the warden/defendant "could only have violated" a hearing-impaired inmate's "right to equal protection if he treated" the inmate "dissimilarly than similarly situated inmates"). Plaintiff submitted no evidence which suggests that the refusal to authorize surgery was discriminatory.

The Court therefore concludes that the denial of authorization for surgery violated neither the Eighth nor Fourteenth Amendment. A necessary corollary of this conclusion, of course, is that the denial violated no right which was "clearly established." *See generally Crockett*, 316 F.3d at 579 (The right in question must be "so clearly established that a reasonable official would understand that the particular conduct at issue violated that right.").

"The ultimate burden of proof is on the plaintiff to show that the defendants are not entitled to qualified immunity." *Rich v. City of Mayfield Heights*, 955 F.2d 1092, 1095 (6th Cir. 1992). Plaintiff cited no judicial decision which supports his contention that the refusal to authorize surgery violated his constitutional rights – let alone a binding decision predating the alleged violation. *See generally Sheets v. Moore*, 97 F.3d 164, 166 (6th Cir. 1996) ("In determining whether a constitutional right is clearly established, a district court must find binding precedent by the Supreme Court, its court of appeals, or

itself." The "unlawfulness must be apparent" under "pre-existing law." (citation and quotation marks omitted)). Thus even if this refusal were unconstitutional, Plaintiff is barred from obtaining monetary relief pursuant to the doctrine of qualified immunity.

II. Accommodation Claim

"Whenever a prisoner is identified as having a medical condition which restricts his . . . ability to function adequately in the institutional environment, a qualified health professional shall identify reasonable options available . . . which will meet the prisoner's special medical need." Policy Directive 04.06.160. Plaintiff alleges that in keeping with this policy, he was moved into a "handicap (single) cell." Complaint at ¶ 43. This accommodation, according to Plaintiff, was authorized by an Assistant Resident Unit Supervisor identified as "M. Risley." *Id.* Plaintiff was not permitted to remain in a single cell, however, and prison officials have denied his request for single-cell accommodation. *See id.* at ¶¶ 40-45, 49; Affidavit of Paul Klee at ¶ 3.

Total Exhaustion

Defendants ask the Court to invoke the "'total exhaustion' rule," Defendants' Brief at 5, which holds that "a prisoner civil rights action" having "both exhausted and unexhausted claims" must "be dismissed in its entirety . . . , rather than simply dismissing . . . the unexhausted claims." *Jenkins v. Toombs*, 32 F.Supp.2d 955, 957 (W.D. Mich. 1999). According to Defendants, "the majority of courts that have addressed the issue have applied" this rule. Defendants' Brief at 5.

As Defendants suggests, there is a split in authority on the question of whether § 1997e(a) mandates dismissal of all claims if at least one has not been exhausted. *See Rivera v. Whitman*, 161 F.Supp.2d 337, 339-40 (D. N.J. 2001), *overruled on other grounds by Ray v. Kertes*, 285 F.3d 287 (3d Cir. 2002) (collecting cases). On two occasions, the Sixth Circuit has acknowledged the issue, without deciding it. *See Burton*, 321 F.3d at 577 ("Because we have concluded that [the] district court erred when it determined that Burton had not administratively exhausted his First Amendment retaliation claim against the defendants, we do not need to reach the question of whether the district court erred when it dismissed Burton's entire lawsuit because Burton failed to exhaust the available administrative remedies with respect to one of his claims.")[5]; *Knuckles El*, 215 F.3d at 642 ("We reserve to

[5] Although *Burton* explicitly declined to decide the issue, the court all but rejected the total-exhaustion rule in *dictum*. *See Burton*, 321 F.3d at 575 n.2 (The "holding" in *Hartsfield v. Vidor*, 199 F.3d 305 (6th Cir. 1999), "illustrates that a prisoner's lawsuit, which alleges multiple claims against multiple defendants, is not vulnerable to dismissal under § 1997e(a) simply because the prisoner has failed to exhaust a particular claim as to a specific defendant."). *See also Riley v. Richards*, No. 99-1327, 2000 WL 332013, at *2 (6th Cir. Mar. 23, 2000) (*per curium*) (likewise citing *Hartsfield* in declaring that "the district court may address the merits of the exhausted claims and dismiss only those that are unexhausted").

Hartsfield affirmed the district court's rejection on the merits of some of the prisoner/plaintiff's claims, and remanded for dismissal of other claims for failure to exhaust. *See Hartsfield*, 199 F.3d at 309-10. But the court did not explicitly address the question of whether exhausted claims must be dismissed along with those that are unexhausted. *Burton* and *Riley* therefore attach undue significance to the case. *See Rose v. Lundy*, 455 U.S. 509, 514 n.5 (1982) ("In *Gooding v. Wilson*, 405 U.S. 518 (1972), this Court reviewed the merits of an exhausted claim after expressly acknowledging that the prisoner had not exhausted his state remedies for all of the claims presented in his

(Continued on following page)

another day the question of whether exhausted claims in a 'mixed' complaint should be addressed . . . or whether such a complaint should be dismissed in its entirety.").

The starting point for resolving this issue is of course § 1997e(a) itself. As noted earlier, that statute prohibits the commencement of an "*action* . . . until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a) (emphasis added). The highlighted term indicates that a court may dismiss *all* claims if at least one has not been exhausted. *See* Black's Law Dictionary (7th ed. 1999) (defining an "action" as a "civil or criminal judicial proceeding"); F.R.Civ.P. 3 ("A civil action is commenced by filing a complaint with the court."); *Hudson v. Reno*, 130 F.3d 1193, 1199-1200 (6th Cir. 1997), *overruled on other grounds by Pollard v. E. I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001) (finding that the "plain" meaning of the term "action," used in 42 U.S.C. § 1981a, is a lawsuit, as distinguished from particular "claims" asserted in a lawsuit); *Rivera*, 161 F. Supp.2d at 341 ("The plain meaning of 'action' " is "patently distinct from 'claim.' ").

This inference is reinforced by another provision in the same statute. Section 1997e(c)(2) authorizes dismissal

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habeas petition. *Gooding* does not control the present case, however, since the question of total exhaustion was not before the Court."); *Knuckles El v. Toombs*, 215 F.3d 640, 642 (6th Cir. 2000) (a post-*Hartsfield* case in which the Sixth Circuit implicitly assumed that it has not yet decided whether all claims must be exhausted to avoid dismissal pursuant to § 1997e(a)); *Smeltzer v. Hook*, 235 F.Supp.2d 736, 742 (W.D. Mich. 2002) (The "issue of total exhaustion was not before the Court" in *Hartsfield.*); *Rivera v. Whitman*, 161 F.Supp.2d 337, 340 n.1 (D. N.J. 2001) (observing that in *Hartsfield*, "the 'total exhaustion' issue . . . was not squarely presented nor considered by the court," and that the "issue was not among those on appeal").

of a frivolous "*claim* without first requiring the exhaustion of administrative remedies." 42 U.S.C. § 1997e(c)(2) (emphasis added). The choice of the word "claim" in this provision logically suggests that "action," as used in subparagraph (a) of § 1997e, refers to the entire lawsuit. *See Rivera*, 161 F. Supp.2d at 341 ("Congress's use of the different terms indicates that it intended different meanings.").

Also noteworthy is the fact that the phrase "civil action with regard to prison conditions," which is nearly identical to the formulation in § 1997e(a), is defined as "any *civil proceeding* . . . with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison." 18 U.S.C. § 3626(g)(2) (emphasis added). This definition implicitly equates a "civil proceeding" with an "action," and thus counsels against a narrow construction of the latter term. *See Rivera*, 161 F. Supp.2d at 340-41.

But while it is fairly clear that §1997e(a) *authorizes* total dismissal, it does not necessarily follow that the statute *requires* it. As noted by Judge Enslen, "a court can prevent a plaintiff from bringing an action before his administrative remedies are exhausted in two ways: by dismissing the complaint altogether or by limiting the complaint to exhausted claims." *Jenkins*, 32 F.Supp.2d at 957. Thus even a partial dismissal is compatible with the language of § 1997e(a). *Cf. Rose v. Lundy*, 455 U.S. 509, 516-518 (1982) (determining that 28 U.S.C. § 2254 is inconclusive on the question of whether a court could review a "mixed" habeas petition – *i.e.* a petition raising

exhausted and unexhausted claims).[6] *But see, e.g., Rivera*, 161 F.Supp.2d at 341 (The statute's "plain language compels a 'total exhaustion' rule.").

Although conceding that the relevant statutory language did not compel its conclusion, *Rose* held that "a district court must dismiss habeas petitions containing both unexhausted and exhausted claims." *Id.* at 522 (footnote omitted). *Rose* justified its holding on the ground that the total-exhaustion rule would promote comity between federal and state courts. *See id.* at 515-19.[7]

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[6] The statute at issue in *Rose* provided that an "application for a writ of habeas corpus . . . shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b) (*quoted in Rose*, 455 U.S. at 516 n.9). Thus it is roughly analogous to 42 U.S.C. § 1997e(a). *See Jenkins*, 32 F.Supp.2d at 957 (noting that the Court in *Rose* "found that . . . language" which was "similar" to § 1997e(a) "did not, in and of itself, impose a total exhaustion requirement").

[7] Subsequent to *Rose*, the habeas statute was amended to provide that an "application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(2). This amendment, however, does not authorize courts to reject specific claims upon which a habeas petition is based. *See Rockwell v. Yukins*, 217 F.3d 421, 424 (6th Cir. 2000) (Section 2254(b) makes "clear that the only circumstance under which mixed petitions may be considered by a district court is where the court determines that the petition must be denied in its entirety."); *see also Martin v. Jones*, 969 F.Supp. 1058, 1063 (M.D. Tenn. 1997) ("The language of § 2254(b)(2) . . . suggests that the courts only have discretion to deny an entire 'mixed' application on the merits, but cannot deny a particular claim."). Thus *Rose*'s total-exhaustion rule was "altered" only "slightly" by § 2254(b)(2). *Rockwell*, 217 F.3d at 424. *See Martin*, 969 F.Supp. at 1063 ("If a court does not elect to deny the whole application, then presumably it must adhere to the total exhaustion rule and dismiss the petition in its entirety.").

Section 1997e(a), calls for deference to prison grievance procedures, rather than to state judicial proceedings as in the habeas statute. However, both § 1997e(a)'s exhaustion requirement and that of the habeas statute are designed to ensure that the prisoner pursue other available avenues before seeking relief from the federal courts. *Compare Rose*, 455 U.S. at 518-19 ("A rigorously enforced total exhaustion rule will encourage state prisoners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error. . . . Equally as important, federal claims that have been fully exhausted in state courts will more often be accompanied by a complete factual record to aid the federal courts in their review.") *with Wyatt*, 193 F.3d at 878-79 (Section 1997e(a) "insure[s] that prisons . . . are given the opportunity to respond to prisoner complaints . . . , so that . . . injuries are prevented in the future. . . . Courts will conserve time and effort as a result of any factfinding during the administrative process. . . . (citation & quotation marks omitted)). *Rose*'s premise – that this design is better served by adherence to the total-exhaustion rule – therefore applies with equal force to § 1997e(a). *See, e.g., Smeltzer v. Hook*, 235 F.Supp.2d 736, 745 (W.D. Mich. 2002); *Rivera*, 161 F.Supp.2d at 342-32. *But see, e.g., Jenkins*, 32 F.Supp.2d at 959.

In short, there is a basis to apply the reasoning of *Rose*'s habeas exhaustion to prisoner cases brought under § 1983. *Cf. Brown*, 139 F.3d at 1103 (Section 1997e(a) "recognizes that it is difficult to explain why we require full exhaustion of state remedies in habeas corpus cases involving life and liberty, but allow direct access in prison rights cases under § 1983."). Consistent with that decision, the Court concludes that § 1997e(a) requires dismissal of

both exhausted and unexhausted claims. *See Wyatt*, 193 F.3d at 879 (Under § 1997e(a), "it is now incumbent upon the district court to assure that the exhaustion requirement has been substantially met before proceeding to the merits of *any* prisoner claims. If the exhaustion requirement has not been substantially met, the federal *case* should be dismissed. . . . " (emphasis added)); *Mack v. Dewitt*, 40 Fed.Appx. 36, 38 (6th Cir. 2002) (*per curiam*) ("When a prisoner . . . only partially exhausts administrative remedies, dismissal of the complaint is appropriate.").

An exception to the total-exhaustion rule is recognized in habeas cases presenting "unusual or exceptional circumstances." *Rockwell v. Yukins*, 217 F.3d 421, 423 (6th Cir. 2000). *Compare Wyatt*, 193 F.3d at 879 (Section 1997e(a) may be subject to "certain limited exceptions."). But even if this exception extends to § 1983 cases, there is no apparent basis for applying it in this case. *Compare Rose*, 455 U.S. at 515-16 (observing that the common-law "exhaustion doctrine" made exceptions "only in rare cases where . . . circumstances of peculiar urgency are shown to exist" (citation, quotation marks & footnote omitted)); *Sitto v. Bock*, 207 F.Supp.2d 668, 676-77 (E.D. Mich 2002) (The "outright dismissal" of a habeas petition for failure to exhaust is inappropriate if the prisoner would be time-barred from re-filing the petition following exhaustion.); *see generally Wyatt*, 193 F.3d at 879 (Any "exceptions" to § 1997e(a) which "may arise . . . will be rare."). Nor have Defendants argued for application of a statutory exception to § 1997e(a), which permits courts to disregard the exhaustion requirement in "the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief." 42 U.S.C.

§ 1997e(c)(2). The total-exhaustion rule should therefore be invoked, and Plaintiff's accommodation claim should accordingly be dismissed along with the medical claim.*

Although this dismissal is without prejudice, the more appropriate source of authority is F.R.Civ.P. 56, rather than F.R.Civ.P. 12. *See Hite v. Kimmerly*, 22 Fed.Appx. 531, 531-32 (6th Cir. 2001) (affirming the district court's grant of summary judgment based on failure to comply with 42 U.S.C. § 1997e(a)); *cf. Ravencraft v. UNUM Life Ins. Co. of America*, 212 F.3d 341, 344 (6th Cir. 2000) (affirming the district court's grant of summary judgment in a disability-benefits case based on failure to exhaust administrative remedies, as required by ERISA, but vacating and remanding with instructions to "dismiss the asserted cause of action without prejudice"). *But see Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir.), *petition for cert. filed*, 71 U.S.L.W. 3668 (U.S. Apr. 1, 2003) (No. 02-1486) (" . . . the failure to exhaust nonjudicial remedies that are not jurisdictional should be treated as a matter in abatement, which is subject to an unenumerated Rule 12(b) motion rather than a motion for summary judgment."); *Mardirossian v. Paul Revere Life Ins. Co.*, 286 F.3d 733, 735 (4th Cir. 2002) (A ruling that the plaintiff failed to exhaust administrative remedies is not on the merits, and therefore summary judgment is inappropriate. Dismissal should instead be "for lack of subject matter jurisdiction."). In keeping with the logic of the total-exhaustion rule, the

* Even if the total-exhaustion rule is not applied, the accommodation claim should be dismissed as against Overton. Plaintiff has produced no evidence to rebut Defendants' assertion that he failed to identify Overton in his accommodation-related grievances. *See* Defendants' Brief at 14.

dismissal should extend to claims asserted against Dr. Pramstaller, regardless of whether those claims were exhausted. *See Burton*, 321 F.3d at 574 (quoted *supra* p. 9).

No Discrimination

To establish that Defendants violated the ADA, the Rehabilitation Act, or the Equal Protection Clause of the Fourteenth Amendment, Plaintiff must demonstrate that the refusal to provide a single cell was motivated by discrimination against him because of his impairment. *See* 42 U.S.C. § 12132 (" . . . no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."); 29 U.S.C. §794(a) ("No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . "); *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 83 (1988) (The Equal Protection Clause is violated by "arbitrary and irrational discrimination."). Along with their motion, Defendants submitted the following evidence:

> (1) Plaintiff was provided with a prisoner assistant to help him with daily activities. *See* Affidavit of Mary Jo Pass at ¶ 3; Affidavit of Chad Markwell at ¶ 4.
>
> (2) Plaintiff was allowed additional time for washing up than is ordinarily accorded to prisoners. Pass Affidavit at ¶ 3.

(3) Plaintiff was assigned a lower bunk. Markwell Affidavit at ¶ 4.

(4) Plaintiff was removed from the handicap cell when it was determined that he did not have appropriate authorization for placement in such a cell, and to make room for an incoming wheelchair-bound prisoner. *See id.* at ¶ 3; Klee Affidavit at ¶ 3; Affidavit of Bonnie Peterson at ¶ 3.[9]

These affidavits indicate that an effort was made to accommodate Plaintiff's impairment – an effort which Plaintiff does not dispute. This tends to undermine the proposition that Defendants were biased against Plaintiff on account of his impairment. Nor does Plaintiff supply compelling evidence of such a bias. Defendants are therefore entitled to summary judgment with respect to this issue.

Eighth Amendment

The Supreme Court has specifically rejected the argument that double-celling is a cruel and unusual punishment. *See Rhodes v. Chapman*, 452 U.S. 337, 347-50 (1981). Plaintiff indicates that this arrangement renders him particularly vulnerable to injury. *See* Plaintiff's Brief at 10, 13, 16. But there is nothing more than scant anecdotal evidence – in the form of Plaintiff's sworn complaint – to support the conclusion that Plaintiff would

[9] Plaintiff acknowledges that a wheelchair-bound inmate was moved into the single cell formerly occupied by Plaintiff. *See* Affidavit of Timothy Williams-El at ¶ 7. The Court rejects as frivolous Plaintiff's suggestion that an alleged delay of "4 to 5 weeks" before this move was made contradicts the assertion that he was relocated in order to make room for the incoming handicapped prisoner. *Id.*

be significantly safer in a single cell. *See* Complaint at ¶ 49 (alleging that in October of 2002, he was "injured" and "developed new tumors" when his "cell-mate accidentally slammed into" his "entire arm and hand"). And even this meager evidence is undermined by the fact that, shortly before his allegedly harmful collision with a cell-mate, Plaintiff explained that he needed a single cell to provide "additional space" to "rest" his arm. Health Care Request (dated September 11, 2002; unmarked exhibit of Plaintiff's Brief). *Compare* Plaintiff's Brief at 17 (indicating that he needs a single cell "for mobility and to cure and ease any future hardship").

A jury could not reasonably infer from this record that double-celling is so risky to Plaintiff's well-being that it constitutes a violation of the Eighth Amendment. Summary judgment should therefore enter as to this issue.

Qualified Immunity

For reasons explained, the Court agrees with Defendant that Plaintiff has not established a constitutional or statutory violation in connection with the accommodation claim. As with the medical claim, then, Defendants are therefore also correct in asserting that Plaintiff is barred by the doctrine of qualified immunity from recovering monetary damages for the alleged failure to accommodate. *See supra* p. 15.

Conclusion

Defendants' motion for dismissal/summary judgment (D/E 27) should be granted. Pursuant to 42 U.S.C. § 1997e(a) and F.R.Civ.P. 56(c), the complaint should be dismissed without prejudice. Alternatively, summary

judgment in favor of Defendants should enter on the merits. The latter disposition would not fully resolve this case, as Plaintiff's claims against Dr. Pramstaller would remain to be adjudicated.[10]

The parties to this action may object to and seek review of this Report and Recommendation, but are required to act within ten (10) days of service of a copy hereof as provided for in 28 U.S.C. § 636(b)(1) and E.D. Mich. LR 72.1(d)(2). Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985); *Howard v. Secretary of HHS*, 932 F.2d 505, 508 (6th Cir. 1991); *United States v. Walters*, 638 F.2d 947, 949-50 (6th Cir. 1981). The filing of objections which raise some issues, but fail to raise others with specificity, will not preserve all the objections a party might have to this Report and Recommendation. *Willis v. Secretary of HHS*, 931 F.2d 390, 401 (6th Cir. 1991); *Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this magistrate judge.

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[10] Plaintiff is proceeding *in forma pauperis*, and the United States Marshal was ordered to effect service. *See* D/E 4; F.R.Civ.P. 4(c)(2). The request for waiver of service on Dr. Pramstaller was returned unsigned with a cover letter from Susan Coley, Administrative Assistant for the MDOC's Bureau of Health Care Services. *See* D/E 11. In this letter, which is dated January 15, 2003, Coley explained that Dr. Pramstaller was "currently out of the office," and would be returning on January 27, 2003. *Id.* However, the Marshal apparently made no further effort to serve Dr. Pramstaller. Thus if the recommendation to dismiss the complaint is not accepted, the Court will enter an order directing the Marshal to again attempt service on Dr. Pramstaller. *See*, F.R.Civ.P. 4(m); *Byrd v. Stone*, 94 F.3d 217, 219-20 (6th Cir. 1996).

Within ten (10) days of service of any objecting party's timely filed objections, the opposing party may file a response. The response shall be no more than 20 pages in length unless, by motion and order, the page limit is extended by the court. The response shall address each issue contained within the objections specifically and in the same order raised.

/s/ Virginia Morgan
VIRGINIA M. MORGAN
UNITED STATES
MAGISTRATE JUDGE

Dated: Jul. 22, 2003

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TIMOTHY WILLIAMS-EL,

Plaintiff,

v.

Case No. 02-CV-75133-DT

WILLIAM OVERTON, DAVID JAMROG, MARY JO PASS, PAUL KLEE, CHAD MARKWELL, DR. GEORGE PRAMSTALLER, and BONNIE PETERSON,

Honorable Denise Page Hood

Defendants.

_____/

ORDER ACCEPTING REPORT AND RECOMMENDATION

(Filed Oct. 31, 2003)

This matter is before the Court on Magistrate Judge Virginia M. Morgan's Report and Recommendation dated July 22, 2003. The Court extended Plaintiff's time to file his Objections to the Report and Recommendation. Plaintiff filed his Objections on September 25, 2003.

The Court has had an opportunity to review the Report and Recommendation and finds that the Magistrate Judge reached the correct conclusion for the proper reasons. The Court agrees with the Magistrate Judge that the Complaint should be dismissed pursuant to 42 U.S.C. § 1997e(a) for failure to exhaust administrative remedies. See *Brown v. Toombs*, 139 F.3d 1102, 1104 (6th Cir. 1998). The Court, therefore, will not address the merits of the

Complaint and the Court takes no position with regards to the Magistrate Judge's analysis on the merits of the Complaint.

Accordingly,

IT IS ORDERED that Magistrate Judge Morgan's Report and Recommendation dated July 22, 2003 is ACCEPTED and ADOPTED as this Court's findings of fact and conclusions of law as to the failure to exhaust administrative exhaustion issue only.

IT IS FURTHER ORDERED that Defendants' Motion to Dismiss or for Summary Judgment (Docket Nos. 27-1 and 27-2, filed April 15, 2003) is GRANTED with regards to the failure to exhaust administrative remedies issue only.

IT IS FURTHER ORDERED that the Complaint is DISMISSED without prejudice.

/s/ Denise Page Hood
DENISE PAGE HOOD
United States District Judge

DATED: OCT 31 2003

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TIMOTHY WILLIAMS-EL,

Plaintiff,

v.

Case No. 02-CV-75133-DT

WILLIAM OVERTON, DAVID JAMROG, MARY JO PASS, PAUL KLEE, CHAD MARKWELL, DR. GEORGE PRAMSTALLER, and BONNIE PETERSON,

Honorable Denise Page Hood

Defendants.
_____/

JUDGMENT

(Filed Oct. 31, 2003)

This action having come before the Court and the Court having entered an Order dismissing the Complaint,

Accordingly,

Judgment is entered in favor of Defendants and against Plaintiff.

DAVID J. WEAVER
CLERK OF COURT

By: /s/ P.R. Sausberry
Deputy Clerk

Approved:

/s/ Denise Page Hood
DENISE PAGE HOOD
United States District Judge

DATED: OCT 31 2003
Detroit, Michigan

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Filed Name: 05a0534n.06
Filed: June 22, 2005

No. 03-2507

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

TIMOTHY WILLIAMS,	)
Plaintiff-Appellant,	)
v.	) **ON APPEAL FROM**
WILLIAM OVERTON, DAVID JAMROG, MARY JO PASS, PAUL KLEE, CHAD MARKWELL, GEORGE PRAMSTALLER, and BONNIE PETERSON,	) **THE UNITED STATES**) **DISTRICT COURT**) **FOR THE EASTERN**) **DISTRICT OF MICHIGAN**
Defendants-Appellees.	)

Before: GIBBONS and SUTTON, Circuit Judges, and EDGAR, District Judge.*

JULIA SMITH GIBBONS, Circuit Judge. Plaintiff-Appellant Timothy Williams, an inmate in a Michigan Department of Corrections (MDOC) facility, filed a *pro se* § 1983 action against several employees of the MDOC. The district court dismissed Williams' case without prejudice based on a finding that Williams had failed to exhaust all

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* The Honorable Robert Allan Edgar, Chief United States District Judge for the Eastern District of Tennessee, sitting by designation.

of his administrative remedies as required by 42 U.S.C. § 1997e(a). Williams appeals that determination.

For the following reasons, we affirm the judgment of the district court.

I.

Williams is an inmate in the custody of the MDOC. Appellant has had "noninvoluting cavernous hemangiomas" in his right arm since birth. This condition creates the growth of tumors and results in disfigurement of his arm.

Denial of Surgery Claim

In March 2001, Williams submitted to surgery performed by Khawaja H. Ikram, D.O., to remove a hemangioma, primarily to relieve the pain accompanying his condition. Williams went to K. Nimr Ikram, D.O. in August 2001 and January 2002 for consultations. At both consultations, further surgery to remove hemangiomas and to straighten his wrist was discussed. On Dr. Ikram's referral, Williams went to see Raymond C. Noellert, M.D. in March 2002. Dr. Noellert concluded that surgery would be "a fairly extensive undertaking" and even in the best case scenario, he "would not expect much in the way of digital flexion over strength, with the hand largely functioning as a passive assist." Dr. Noellert discussed this opinion with Williams, and authorized the treatment because Williams "simply cannot stand the hand the way it is."

The Correctional Medical Services ("CMS") denied authorization of the surgery, stating that "functional

return of hand is not a known result. Surgery would be cosmetic and dangerous." On March 26, 2002, this result was appealed on the grounds that the "request is for pain relief not to regain function." The request was again denied, due to the "hazards" of the surgery and the "probable futility of it." The result was again appealed on April 8, 2002 and the CMS decided to present the case at an upcoming medical meeting.

Williams completed a Prisoner/Parolee Grievance Form on June 17, 2002, complaining that he had requested medical follow-up care and had not been treated. Williams failed to specifically name any of the appellees in the Grievance. The Medical Services Advisory Committee upheld the non-approval. Williams appealed this decision through Steps II and III of the grievance process, but both appeals were denied.

Single-Occupancy Cell Accommodation Claim

On August 13, 2002, Williams requested, among other accommodations, placement in a "handicapped accessible single cell" to accommodate his condition. On August 22, 2002, he filed a Prisoner/Parolee Grievance Form against Warden Jamrog requesting the same accommodation. This request was denied. Williams appealed the denial of placement in a single cell through Steps II and III of the grievance process, but his appeals were denied because he was not eligible under prison regulations for placement in a single occupancy cell. Apparently, at some point Williams was placed in a single occupancy cell, but was later removed from the cell because Williams failed to provide medical documentation or other evidence that he qualified for single cell occupancy. After his removal, Williams filed

a Grievance Form against Deputy Warden of Housing Klee and Supervisor Peterson. Williams unsuccessfully appealed the denial of these grievances through Steps II and III of the process.

District Court Opinion

Williams filed a *pro se* § 1983 action against various members of the MDOC – Appellees Jamrog, Klee, Markwell, Pass, Peterson and Overton – claiming that (1) he was denied the surgical procedure to remove the tumors in his hand, and (2) he was improperly denied placement in a single occupancy cell. Williams claimed a violation of the Americans with Disabilities Act, the Rehabilitation Act, and the Eighth and Fourteenth Amendments, seeking injunctive and monetary relief. In lieu of filing an answer, defendants-appellees Jamrog, Markwell, Pass, Klee, Peterson and Overton filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b) and a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56(b). United States Magistrate Judge Virginia M. Morgan reviewed the case and issued a Report and Recommendation which recommended that the defendants' motions be granted. The magistrate judge reached the following conclusions: (1) the motion to dismiss should be granted because Williams failed to name any of the defendants specifically in his grievances filed regarding his medical claim, and thus had failed to exhaust his administrative remedies; (2) defendants were entitled to summary judgment due to the fact that Williams failed to present evidence to support his claim with regard to the medical procedure; (3) the defendants were entitled to qualified immunity on Williams' medical claim; (4) defendants should be granted summary judgment on Williams'

accommodation claim due to the "total exhaustion" rule based on Williams' failure to exhaust his medical claim; (5) Williams failed to survive the summary judgment standard with respect to his accommodation claim pursuant to the ADA, the Rehabilitation Act, the Eighth or the Fourteenth Amendments; and (6) defendants were entitled to qualified immunity on Williams' accommodation claim.

The district court reviewed the Magistrate Judge's Report and Recommendation and dismissed the complaint for failure to exhaust administrative remedies pursuant to 42 U.S.C. § 1997e(a). The district court explicitly failed to address the remainder of the Magistrate Judge's analysis. Williams filed a timely appeal from the district court's order.

II.

This court reviews *de novo* a district court's dismissal for failure to exhaust administrative remedies. *Curry v. Scott*, 249 F.3d 493, 503 (6th Cir. 2001); *White v. McGinnis*, 131 F.3d 593, 595 (6th Cir. 1997).

The district court held that Williams had failed to exhaust his administrative remedies because although he had filed a grievance and pursued the appropriate appeals with regard to the denial of his request for surgery, he failed to identify any of the defendants personally, and thus had failed to exhaust his claim with respect to those individuals as required by *Curry*, 249 F.3d at 504-05. Applying the total exhaustion rule, the district court dismissed Williams' complaint in its entirety, despite the fact that he appears to have exhausted his administrative remedies with respect to the single-occupancy cell accommodation claim.

The Prison Litigation Reform Act requires prisoners who wish to file a civil rights action regarding the conditions of their confinement to exhaust all available administrative remedies prior to filing suit in federal court. 42 U.S.C. § 1997e(a); *Brown v. Toombs*, 139 F.3d 1102, 1104 (6th Cir. 1998). The prisoner bears the burden of showing that all administrative remedies have been exhausted by attaching any decision demonstrating the "administrative disposition of his complaint." *Brown*, 139 F.3d at 1104. The prisoner must demonstrate that he has exhausted the administrative remedies with respect to each individual he intends to sue. *Thomas v. Woolum*, 337 F.3d 720, 735 (6th Cir. 2003); *Burton v. Jones*, 321 F.3d 569, 574 (6th Cir. 2003).

The exact statutory language of 42 U.S.C. § 1997e(a) states:

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

Until fairly recently, there had been a lack of clear consensus on whether the language of 42 U.S.C. § 1997e(a) compels total exhaustion. Recently, however, this court "definitively answer[ed]" the question of whether a prisoner's complaint containing both exhausted and unexhausted claims must be dismissed under the PLRA in the affirmative. *See Jones Bey v. Johnson*, 407 F.3d 801, 805 (6th Cir. 2005). Pursuant to this circuit's opinion in *Jones Bey*, it is now clear that total exhaustion is required in order for a prisoner to bring a civil rights action in this court. *Id.* at 809.

Williams has failed to satisfy the requirement of total exhaustion under the PLRA, and thus, the district court's judgment must be affirmed. Williams did file a grievance based on the denial of medical treatment, and he appealed the grievance through Steps II and III of the grievance process, thus pursuing the claim through all stages of the process. However, the grievance failed to specifically name any of the appellees that Williams has named in his complaint. Because Williams has failed to exhaust his claims with respect to individual appellees, his complaint must be dismissed under the PLRA. *See Burton*, 321 F.3d at 574 ("[A] prisoner must administratively exhaust his or her claim as to each defendant associated with the claim.").

With respect to Williams' accommodation claim, Williams filed a grievance against specific individuals and appealed the grievance through Steps II and III of the process. Thus, it appears that Williams exhausted his administrative remedies on the accommodation claim, a conclusion not contested by the defendants-appellees. Despite Williams' apparent exhaustion of this issue, however, *Jones Bey* requires that the entire action be dismissed due to Williams' failure to exhaust his medical claims. *See Jones Bey*, 407 F.3d at 807.

III.

For the foregoing reasons, we affirm the judgment of the district court.

United States District Court
Western District of Michigan (Marquette)
CIVIL DOCKET FOR
CASE #: 2:02-cv-00117-GJQ-TPG

Walton #173849 v. Bouchard et al

Date Filed	#	Docket Text
08/12/2002	1	COMPLAINT with Magistrate Referral against all defendants; filed by pro se John H. Walton #173849 (Attachments:, # 1 Attachment Affidavit, # 2 Financial Documents (ifp)) (slk,) (Entered: 08/14/2002)
08/12/2002	2	MOTION to Dismiss *Defendant Ron Bobo* by pro se John H. Walton #173849 (slk,) (Entered: 08/14/2002)
		* * *
10/15/2002	7	ORDER REGARDING PARTIAL SERVICE: dismissing defendant Bobo; the Clerk is to arrange for service of this order and the complaint; signed by Judge Greeley (Magistrate Judge Timothy P. Greeley, cpl) (Entered: 10/15/2002)
		* * *
11/18/2002	20	MOTION to Amend/Correct 1 by pro se John H. Walton #173849 (slk,) (Entered: 11/18/2002)
		* * *
12/05/2002	27	ORDER granting 20 Motion to Amend/Correct; signed by Judge Greeley (Magistrate Judge Timothy P. Greeley, cpl) (Entered: 12/05/2002)
		* * *

12/12/2002 29 SUPPLEMENT re 1 by pro se John H. Walton #173849 (slk,) (Entered: 12/16/2002)

12/12/2002 30 SUPPLEMENT re 1 by pro se John H. Walton #173849 (slk,) (Entered: 12/16/2002)

* * *

01/13/2003 32 MOTION to Dismiss by Catherine Bauman, D. Bergh, Barbara Bouchard, Denise Gerth (erv,) (Entered: 01/13/2003)

01/13/2003 33 BRIEF in Support of 32 filed by Catherine Bauman, D. Bergh, Barbara Bouchard, Denise Gerth (Attachments:, # 1 Attachment, # 2 Exhibit A) (erv,) (Entered: 01/13/2003)

* * *

01/21/2003 36 MOTION for Summary Judgment by pro se John H. Walton #173849 (Attachments:, # 1 Attachment) (slk,) (Entered: 01/21/2003)

* * *

02/14/2003 40 MOTION for order *to Adopt by Reference the Motion and Brief filed on or about January 7, 2003* by defendant Ken Gearin ; (slk,) (Entered: 02/14/2003)

02/14/2003 41 BRIEF in support of 40 filed by Ken Gearin (slk,) (Entered: 02/14/2003)

* * *

02/28/2003 44 ORDER granting 40 motion to adopt; signed by Magistrate Judge Timothy P. Greeley (Magistrate Judge Timothy P. Greeley, cpl) (Entered: 02/28/2003)

* * *

02/28/2003 45 MOTION for summary judgment by plaintiff John H. Walton #173849 (Named as Plaintiff Motion for Summary Judgment and Opposit to Defendants Motion for Summary Judgment); responses due 3/28/2003; (Attachments: # 1 Order Rejecting Pleading) (slk,). (Entered: 02/28/2003)

* * *

03/07/2003 47 RESPONSE in opposition re 32 filed by John H. Walton #173849 (Attachments: # 1 Attachment letter) (slk,) (Entered: 03/10/2003)

* * *

04/21/2003 53 AFFIDAVIT in support re 52 filed by John H. Walton #173849 (Attachments: # 1 Exhibit A# 2 Exhibit B# 3 Exhibit C# 4 Exhibit D# 5 Exhibit E# 6 Exhibit F# 7 Exhibit G# 8 Exhibit H# 9 Exhibit I# 10 Exhibit IA# 11 Exhibit J# 12 Exhibit K# 13 Exhibit L# 14 Exhibit M# 15 Exhibit N# 16 Exhibit O# 17 Exhibit P# 18 Exhibit PA# 19 Exhibit Q# 20 Exhibit R# 21 Exhibit S# 22 Exhibit T# 23 Exhibit W# 24 Exhibit X# 25 Exhibit Y# 26 Exhibit YA# 27 Exhibit Z# 28 Exhibit 1# 29 Exhibit 1A# 30 Exhibit 2# 31 Exhibit 3# 32 Exhibit 4# 33 Exhibit 5# 34 Exhibit 6# 35 Exhibit 7# 36 Exhibit 8# 37 Exhibit 9# 38 Exhibit 10# 39 Exhibit 11# 40 Exhibit 12) (slk,) (Entered: 04/23/2003)

* * *

06/10/2003 56 MOTION for summary judgment by plaintiff John H. Walton #173849; responses due 7/8/2003; (slk,) (Entered: 06/10/2003)

07/28/2003 58 REPORT AND RECOMMENDATION that defendants' motion to dismiss (#32) be granted and plaintiff's motions for summary judgment (#36, #45, #56) be denied; objections to R&R due by 8/11/2003; signed by Magistrate Judge Timothy P. Greeley (Magistrate Judge Timothy P. Greeley, cpl) (Entered: 07/28/2003)

* * *

09/08/2003 63 OBJECTION by plaintiff John H. Walton #173849 to Report and Recommendation 58 (cam,) (Entered: 09/08/2003)

* * *

10/14/2003 65 OPINION AND ORDER APPROVING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION 58 re 32, 56, 45, 36; no good-faith basis for appeal; case closed; signed by Judge Gordon J. Quist (Judge Gordon J. Quist, jmt) (Entered: 10/14/2003)

10/14/2003 66 JUDGMENT in favor of Defendants against Plaintiff; Defendants' motion to dismiss 32 GRANTED; Plaintiff's motion for summary judgment [36, 45, 56] DENIED; case DISMISSED without prejudice; signed by Judge Gordon J. Quist (Judge Gordon J. Quist, jmt) (Entered: 10/14/2003)

* * *

10/29/2003 67 NOTICE OF APPEAL re 66 by plaintiff John H. Walton #173849 (cam,) (Entered: 10/29/2003)

* * *

General Docket
US Court of Appeals for the Sixth Circuit
#03-2458

Walton v. Bouchard, et al, et al

11/17/03	Prisoner Case Docketed. Notice filed by Appellant John H. Walton. (stb)
	* * *
12/11/03	BRIEF filed by John H. Walton for Appellant John H. Walton. Copies: 07. Certificate of service date 12/5/03 Number of Pages: 05++. [03-2458] (rgf)
	* * *
2/2/04	BRIEF filed by Kevin R. Himebaugh for Appellee Denise Gerth, Appellee Catherine Bauman, Appellee D. Bergh, Appellee Ken Gearin, Appellee Barbara Bouchard. Copies: 07. Certificate of service date 1/30/04. Number of Pages: 13. [03-2458] (rgf)
	* * *
2/2/04	Appellee MOTION : to waive the filing of an appendix. Motion filed by Kevin R. Himebaugh for appellees Bouchard, et al. Certificate of service 1/30/04. [03-2458] (stb)
2/5/04	ORDER filed granting appellees' motion to waive the requirement of filing a joint appendix as the record may be viewed electronically. [03-2458] (stb)
	* * *
2/20/04	REPLY BRIEF filed by John H. Walton for Appellant John H. Walton Copies: 07. Certificate of service date 2/17/04 [03-2458] (rgf)

* * *

12/7/04	CAUSE SUBMITTED on briefs to panel consisting of Judges Gibbons, Sutton, Edgar sitting on 02/04/05. [03-2458] (kal)

* * *

6/17/05	OPINION filed : the district court's dismissal of the complaint is AFFIRMED, decision not for publication pursuant to local rule 28(g) 6 pgs. [03-2458] Julia S. Gibbons, Jeffrey S. Sutton (AUTHORING), Circuit Judges; R. A. Edgar, District Judge (ED TN). (stb)

* * *

7/11/05	MANDATE ISSUED with costs to be recovered by Appellee Barbara Bouchard, Appellee Ken Gearin, Appellee D. Bergh, Appellee Catherine Bauman, Appellee Denise Gerth. Amount: $47.25. [03-2458] (rgf)

* * *

FORM TO BE USED BY A PRISONER IN FILING A COMPLAINT UNDER THE CIVIL RIGHTS ACT, 42 U.S.C. § 1983

(Filed Aug. 12, 2002)

In the United States District Court
For the Western District of Michigan

JOHN H. WALTON 173849

(Enter above the full names of all plaintiffs, including prisoner number, in this action.)

v. 2:02 CV-117

BARBARA BOUCHARD, WARDEN, ADW KEN GERIN, ADW D. BERGH, ROM CATHY BAUMAN CASE MANAGER DENISE GERTH, RON BOB, ADW

Gordon I. Quist
U.S. District Judge

Timothy P. Greeley
U.S. Magistrate Judge

(Enter above the full name of the defendant or defendants in this action.)

Instructions for Filing a Complaint by a Prisoner Under the Civil Rights Act, 42 U.S.C. § 1983

This packet includes four copies of a complaint form. To start an action, you must file an original and one copy of your complaint for each defendant you name and one copy for the court. For example, if you name two defendants you must file the original and three copies of the complaint. You should also keep an additional copy of the complaint for your own records. All copies of the complaint must be identical to the original. **The clerk will not file your**

complaint unless it conforms to these instructions and to these forms.

In order for this complaint to be filed, it must be accompanied by the filing fee of $150.00. In addition, the United States Marshal will require you to pay the cost of serving the complaint on each of the defendants.

If you are unable to prepay the filing fee and service costs for this action, you must petition the court to proceed *in forma pauperis* by completing and signing the attached affidavit in support of application (pages 2-3). You must also have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution. **If the court grants you leave to proceed *in forma pauperis*, you will still be required to pay the $150.00 filing fee through an initial partial filing fee and through monthly installments.**

Your complaint must be legibly handwritten or typewritten. You, the plaintiff(s), must sign and date the complaint on the last page. If you need additional space to completely answer a question, you must attach additional pages.

Your complaint can be brought in this court only if one or more of the named defendants is located within this district. Further, you must file a separate complaint for each claim that you have unless they are all related to the same incident or issue.

You are required to furnish, so that the United States Marshal can complete service, the **correct name and address of each person you have named as defendant.** A PLAINTIFF IS REQUIRED TO GIVE INFORMATION TO THE UNITED STATES MARSHAL TO

ENABLE THE MARSHAL TO COMPLETE SERVICE OF THE COMPLAINT UPON ALL PERSONS NAMED AS DEFENDANTS.

You will note that you are required to give facts. THIS COMPLAINT SHOULD NOT CONTAIN LEGAL ARGUMENTS OR CITATIONS.

When these forms are completed, mail the original and copies to the Clerk of the United States District Court for the Western District of Michigan at any of the addresses below:

U.S. District Court
399 Federal Building
110 Michigan St., NW
Grand Rapids, MI 49503

U.S. District Court
229 Federal Building
P.O. Box 698
Marquette, MI 49855

U.S. District Court
B-35 Federal Building
410 W. Michigan Ave.
Kalamazoo, MI 49007

U.S. District Court
113 Federal Building
315 W. Allegan
Lansing, MI 48933

COMPLAINT

I. Previous Lawsuits

CAUTION: The Prison Litigation Reform Act has resulted in substantial changes in the ability of incarcerated individuals to initiate lawsuits in this and other federal courts without prepayment of the required $150 filing fee. Accurate and complete responses are required concerning your litigation history. Generally, a plaintiff's failure to accurately and completely answer the questions set forth below will result in denial of the privilege of proceeding *in forma pauperis* and require you to pay the entire $150

filing fee regardless whether your complaint is dismissed.

A. Have you ever filed a lawsuit while incarcerated or detained in any prison or jail facility?

Yes ☒ No ☐

B. If your answer to question A was yes, for each lawsuit you have filed you must answer question 1 through 5 below. Attach additional sheets as necessary to answer questions 1 through 5 below with regard to each lawsuit.

1. Identify the court in which the lawsuit was filed. If it was a state court, identify the county in which the suit was filed. If the lawsuit was filed in federal court, identify the district within which the lawsuit was filed.

Alger County Munising, Mich. Small Claims Court

2. Is the action still pending?
Yes ☐ No ☒

a. If your answer was no, state precisely how the action was resolved: dismissed without prejudice

3. Did you appeal the decision?
Yes ☐ No ☒

4. Is the appeal still pending?
Yes ☐ No ☒

a. If not pending, what was the decision on appeal? _____

5. Was the previous lawsuit based upon the same or similar facts asserted in this lawsuit?

Yes ☐ No ☒

If so, explain: _____

_____

II. Place of Present Confinement Alger Max. Corr. Facility

If the place of present confinement is not the place you were confined when occurrence that is subject of instant lawsuit arose, also list the place you were confined: _____

III. Exhaustion of Administrative Remedies

CAUTION: You are required by federal law to exhaust your available remedies on any action brought with respect to jail, prison, or other correctional facility conditions prior to bringing an action under 42 U.S.C. § 1983 or any other federal law. Once again, failure to provide complete and accurate answers to the questions set forth below will likely result in denial of the privilege of proceeding *in forma pauperis*. ATTACH COPIES OF ALL DOCUMENTS EVIDENCING EXHAUSTION OF REMEDIES.

A. Is your place of confinement a facility operated by the Michigan Department of Corrections?

Yes ☒ No ☐

B. If your answer to A was yes, did you file a grievance concerning the facts set forth in this complaint?

Yes ☒ No ☐

1. If your answer is no, explain why a grievance was not filed: _____

_____

2. If your answer is yes, list the grievance number(s) and the date listed as "Today's Date" box on the Prisoner/Corrections Client Grievance Form: 5/4/02

3. What was the decision upon your grievance at Step I? Stated:No Racial Discrimination

C. If your answers to A and B are yes, did you appeal the Step I decision?

Yes ☒ No ☐

1. If your answer above was yes, what was the Step II decision? Stated I showed No New Evidence

Did you appeal to Step III?

Yes ☒ No ☐

If your answer above was yes, what was the decision at Step III? Stated: The Evidence does Not Support The Charges

D. Does your complaint concern a misconduct charge filed against you?

Yes ☒ No ☐

1. Did you have an administrative hearing on the misconduct charge?

Yes ☐ No ☐

If yes, what was the hearing officer's decision? Guilty Based On The C/O's Statement

2. Did you request an administrative rehearing?

Yes ☒ No ☐

If you did request an administrative rehearing, what was the decision rendered upon rehearing? If you did request an administrative rehearing, what was the decision rendered upon rehearing? Denied

3. After rehearing, did you appeal the decision in one of the circuit courts for the State of Michigan?

   Yes ☐ No ☒

   a. If yes, what was the decision of the circuit court? _____

   b. Did you appeal the decision of the circuit court?

      Yes ☐ No ☒

      If yes, state the decisions of the Michigan Court of Appeals and Michigan Supreme Court: _____

      _____

E. If your claim concerns confinement within a facility not operated by the Michigan Department of Corrections, please state in detail the steps you have taken to exhaust your available state remedies prior to filing this lawsuit: _____

F. If you have taken any other steps to exhaust your state remedies, please describe in detail what steps you have taken: I've Written Several Letter(s) To The Warden ADW(S) ROM, Case Manager

STATEMENT OF CLAIMS (CONT)

This is a 1983 Action Filed by John Walton, A State Prisoner, Alleging Violation Of his Constitutional Rights

(5) And (14th) Of Equal Protection Law. Am Seeking Compensatory and Punative Damages.

/s/ John H. Walton
John H. Walton

IV. Parties

In Item A below, place your name in the first blank and place your present address in the second blank. Do the same for additional plaintiffs, if any.

A. Name of Plaintiff John H. Walton

Address Alger Max Corr. Facility – Munising Mich

In Item B below, place the full name of the defendant in the first blank, his or her official position in the second blank and his or her place of employment in the third blank. Use Item C for the names, positions and place of employment of all additional defendants. Attach extra sheets as necessary. **State whether your are suing each defendant in an official or personal capacity.**

B. Defendant Ken Gerian is employed as Deputy Warden at Alger Max Corr Facility

C. Additional Defendants Warden: Barbra Bouchard ADW; D. Bergh ADW, Ron Bobo ADW, Rom Cathy Bouman, Case Manager Denise Gerth

V. Statement of Claim

State here, as briefly as possible, the **facts** of your case. Describe how each defendant is personally involved. Include also, the names of other persons involved, dates and places. **Do not give any legal**

arguments or cite any cases or statutes. If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. Use as much space as you need. Attach extra sheets if necessary.

On 7/17/01 I Was Placed On A Sanction Called "Upper Slot" (Indefinite) by Ken Gearin, Deputy Warden. While White Prisoner(s) was given less Sanction(s) For The Same 008 Assult/Staff Victim. I've Written Letters To The Warden, To The New Deputy Warden D. Bergh, I've Spoken To RUM Bouman Several Time I've Spoken Case Manager Gerth Several Times, I Spoken Written To The Inspecter Schtuz.

#1.) Ken Gerin Deputy Warden is Who Placed Me On Indefinite Upper Slot

#2.) Barbra Bouchard, The Warden, has been Kited Several Times Concerning This discrimination

#3.) D. Bergh, The "New" Deputy Warden Has Been Kited Several Times Concerning This discrimination

#4.) Cathy Bauman, The RUM Has Been Kited And Ive Spoken To Her Several Times Concerning This discrimination.

#5.) Denise Gerth, The Case Manager, Whom Ive Spoken To, Kited Several Times Was Well Aware Of The discrimination.

#6.) This 1983 Form is About (Racial discrimination Of Sanctions Imposed

Ron Bobo, ADW Was Also Kited.

VI. Relief

State briefly and precisely what you want the court to do for you.

_____

_____

_____

_____ _____

Date Signature of Plaintiff

NOTICE TO PLAINTIFF(S)

The failure of a *pro se* litigant to keep the court apprised of an address change may be considered cause for dismissal.

[Handwritten]

RELIEF

Plaintiff, Respectfully Requests That This Honorable Court Grant Him The Following Relief:

A Any Declaratory Judgment/Ruling deemed Fair Just And Approprate.

B. Any junctive Relief deed Fair And Just And Approprate

C. Order defendants To Rescind & Revoke upperslot Restriction.

D. Grant Compensatory damages in The Amount Of 1.#) $250,000.^{00} Against Each defendant in Their Official Capacities.

E. Grant Punative Damages in The Amount Of 1.$250,000.^{00} Against Each Named defendant in Their

Official Capacities #2.)$250.000.^{00} Against Each Named Defendant in Their Personal Capacities.

F. Fee & Cost To Plaintiff For Time Spent And Expensatures litigating This Action.

G. Attorney Fees Pursuant To 42 USC 1988

H. Any Other Relief deemed Fair Just And Appropriate

Respectfully
Submitted

7/18/02 John H. Walton

[Handwritten]

AFFIDAVIT OF JOHN H. WALTON

1.) That I Am A State Prisoner Currently Confined At Alger Max Corr Facility, Musining Mich,

2.) I have been At Alger Max Facility Since 3/26/99.

3.) On 7/17/01 While In (Adm Sec.) I Was Written A Major Misconduct 008 Assault On Staff.

4.) C/O Stated That during Evening Meal I hit him on the left Wrist With My Food Tray

5.) On 7/17/01 I Was Placed On Indefinate Upper Slot Restriction by Deputy Warden Ken Gerain.

6.) I Am A "Black" Man Prisoner

7.) A White Prisoner ___ Gross #223745 Was Written A 008 Assaualt On Staff On March ?? 02.

8.) The White Prisoner is No Longer On Upper Slot Restriction (Sanction.)

9.) Prisoner Gross, Was Only Given (60) days of Upper Slot Restriction.

10.) Another White Prisoner James Sarah, #280314; Was Written A 008 Assult On Staff.

11.) Prisoner Sarah #280314 is No Longer On Upper Slot Sanction.

12.) Please Note: That Prisoner Sarah 280314 has been On Upper Slot Sanction (3) Three Times

13.) Due To Me being Placed On Upper Slot Sanction I have been Written Over 15 Major Tickets Related To Upper Slot.

14.) On 7/22/01 I Was Written A Disobeying A direct Order Misconduct. (D.D.O.)

15.) On 7/25/01 I Was Written A D.D.O.

16.) On 11/20/01 I Was Written A D.D.O.

17.) On 11/21/01 I Was Written A D.D.O.

18.) On 11/28/01 I Was Written A D.D.O.

19.) On 2/17/02 I Was Written A D.D.O.

20.) On 2/27/02 I Was Written A D.D.O.

21.) On 5/23/02 I Was Written A D.D.O.

22.) I have Written Several Grievances Concerning My Upper Slot And Not being Feed.

23.) On 1/27/02 I Wrote A Grievance Acting Deputy Ron Babo, Said it Was Not Grievable

24.) On 3/3/02 I Wrote A Grievance Dep Warden D. Bergh, Rejected My Grievance.

25.) On 3/11/02 I Wrote A Grievance Dep. D. Bergh Rejected My Grievance.

26.) On 4/19/02 I Wrote A Grievance Concerning The degrading Manner in Which C/O's Was Treating Me.

27.) On 4/29/02 I Wrote A Grievance Again For Not being Feed

28.) On 5/23/02, I Wrote A Grievance Again About Not being Feed.

29.) I have Written Several Letters And Kite(s) To The Adm "Heads" No Reply From None Of Them.

30.) On 11/25/01 I Wrote The Warden B. Bouchard, No Response.

31.) On 12/?/01 Again I Wrote Warden B. Bouchard, No Response.

32.) On 2/17/02 I Wrote The Director Bill Martin No Response.

33.) On 3/24/02 I Wrote ADW Ron Bobo, No Reply.

34.) On 4/22/02 I Wrote Kathleen Hawk, Director Bureau Of Prison(s) Wash, DC No Response.

35.) On 4/29/ I Wrote The Warden, ADW Bergh, The Inspector, No Response.

36.) On 5/14/02 I Wrote Dep. Warden D. Bergh, No Response.

37.) On 6/13/ I Wrote The Inspector No Reply.

38.) Upper Slot is A Restriction/Sanction That is Surpose To be Reviewed Every (7) days by the dep Warden

39.) A Prisoner is Only To Remain On A Sanction If He/She is disruptive.

40.) Upper Slot is A Restriction/Sanction Where (2) Two Officer Are Needed.

41.) Without A Supervior Present "Most" Officer Will Lie And Not Feed Me

42.) Due To The Racial discrimination Of The Sanction I have been belittled, Abused And degraded.

43.) The Above Named defendants Each Showed A deliberate Indifference And Each Was Aware Of The discrimantion but Refused To do Anything.

44.) The Above Named defendants Each demonstrated Intentional And Purposelful discrimination None Responsed And None Looked Into My Claim

45.) My Complaint is About The discrimination Of The Sanction And Equal Protection Under The (5th) And (14th) Admendment.

/s/ John H. Walton
JOHN H. WALTON

Sworn To before Me This
___ day of Aug. ___ 2002

Notary Public

[Handwritten]

John H. Walton

Plaintiff

v

Barbara Bouchard

defendants et. al

Case No. 2:02-CV-117

(Filed Nov. 18, 2002)

Amendment of Complaint
For Incorrect date And demand For Jury Trail.

Assistant Attorney General

The Correct date in Which I Was Placed On Indefinite Upper Slot Was July 17, 2001 Not July 17, 2002. Also, The Plaintiff Demands That He has A Jury Trail.

/s/ John H. Walton

Lynne Phillip
11/13/02
3/1/2006
Notary Alger County

MICHIGAN DEPARTMENT OF CORRECTIONS **POLICY DIRECTIVE**	EFFECTIVE DATE 11/01/00	NUMBER 03.02.130
	SUPERSEDES 03.02.130 (10/11/99)	
SUBJECT PRISONER/PAROLEE GRIEVANCES	AUTHORITY MCL 24.207(k); 791.203	
	ACA STANDARDS 3-4017, 3-4173, 3-4271, 3-4331, 3 ACRS 3D-07	
	PAGE 1 OF 7	

I. POLICY STATEMENT: Prisoners and parolees shall be provided with an effective method of seeking redress for alleged violations of policy and procedure or unsatisfactory conditions of confinement.

II. POLICY: DEFINITIONS

A. Grievant – A prisoner or parolee who files a grievance.

B. Respondent – The staff person who investigates and responds to a grievance.

GENERAL INFORMATION

C. For purposes of this policy, "Warden" includes the Administrator of the Special Alternative Incarceration Program facility (SAI), unless otherwise specified.

D. The grievance process shall be equally available to all prisoners housed in Correctional Facilities Administration (CFA) and Field

Operations Administration (FOA) facilities and all parolees, unless placed on modified access pursuant to this policy. Prisoners at the Michigan Youth Correctional Facility shall utilize the grievance process as set forth in PD 05.01.145 "Michigan Youth Correctional Facility".

E. Grievances may be submitted regarding alleged violations of policy and procedure or unsatisfactory conditions of confinement which directly affect the grievant. This includes alleged violations of this policy and related procedures. A grievant may grieve the *application* of a policy or procedure only if it affects him/her personally and it is something over which the Department has control. A prisoner or parolee may not grieve the *content* of policy or procedure. If a CFA prisoner has a concern with the content of a policy or procedure which personally affects the prisoner, s/he may direct comments to the Warden's Forum through the housing unit representative as provided in PD 04.01.150 "Prisoner Housing Unit Representatives/Warden's Forum". A copy of all Warden's Forum minutes shall be sent to the Prisoner Affairs Section, Office of Program Services (OPS),

Administration and Programs (A&P), for review of all issues relevant to policy and procedure and the prisoner grievance process.

F. Grievances that raise the following non-grievable issues shall be rejected by the Grievance Coordinator.

1. Decisions made in hearings conducted by hearing officers of the Hearings and Appeals Division of the Office of Policy and Hearings, and decisions made in minor misconduct hearings;
2. The content of administrative rules, policy directives, operating procedures and Director's Office Memoranda;
3. Decisions made by the Parole Board and recommendations made by its hearing officers to grant, rescind, amend or revoke parole;
4. Issues which affect the entire prisoner population or significant numbers of prisoners. Such issues in CFA may be brought to the attention of the administration as provided in PD 04.01.150. Two or more prisoners may not jointly file a single grievance regarding an issue of mutual

impact or submit identical individual grievances regarding a given issue as an organized protest.

G. Prisoners and parolees are required to file grievances in a responsible manner. A grievance shall be rejected by the Grievance Coordinator if it contains profanity, threats of physical harm or language which demeans the character, race, ethnicity, physical appearance, gender, religion or national origin of any person, unless it is part of the description of the grieved behavior and is essential to that description. A grievance *may* be rejected for the following reasons:

1. It is duplicative, vague, illegible or contains multiple unrelated issues.

2. The grievant does not indicate s/he attempted to verbally resolve the issue with the staff member involved prior to filing the grievance unless prevented by circumstances beyond his/her control.

3. The grievance is filed in an untimely manner. The grievance shall not be rejected if the grievance provides a valid reason for the delay; e.g., transfer.

H. A prisoner or parolee whose grievance is rejected may appeal the rejection to the next step as set forth in this policy.

I. Grievances shall not be placed in Counselor files, Record Office files, field files or Central Office files, nor shall they be referenced on any document placed in these files except as necessary pursuant to Paragraph K. Grievance documents and files shall be accessed only to investigate or respond to a pending grievance, to respond to a request under the Freedom of Information Act, to respond to a request from the Office of the Legislative Corrections Ombudsman, the Department of Attorney General or appropriate Central Office staff, for audits, or for statistical reporting.

J. A grievant shall not be penalized in any way for filing a grievance except as provided in this policy for misusing the grievance process. Staff shall avoid any action that gives the appearance of reprisal for using the grievance process or for assisting other grievants in its use. If a grievant believes s/he has been subjected to acts of reprisal, s/he may file a grievance.

K. If a grievant intentionally files a grievance which is investigated

and determined to be unfounded which, if proven true, may have caused an employee or a prisoner to be disciplined, or may have caused an employee to be subjected to corrective action, the grievant may be placed on modified access consistent with Paragraphs JJ through NN of this policy. In addition, if the grievant is a prisoner, s/he may be issued a misconduct report if approved by the Warden or Area Manager. The misconduct report shall be processed as set forth in PD 03.03.105 "Prisoner Discipline".

L. Wardens and FOA Area Managers shall ensure a prisoner is provided assistance in completing a grievance form, if needed. In such cases, assistance shall be provided by a staff member who is not involved in the grievance.

M. The OPS Administrator shall ensure that a computerized grievance tracking system is developed and made available for use by OPS and Grievance Coordinators.

HURON VALLEY CENTER

N. Grievances filed by a prisoner at the Huron Valley Center (HVC) involving the prisoner's incarceration (e.g., time computation, disciplinary credits, good time, annual review and restoration,

access to law books from the Huron Valley Men's Facility) shall be forwarded to the Grievance Coordinator at the Huron Valley Men's Facility for processing and response.

O. Grievances filed by a prisoner at HVC relating to the prisoner's treatment and living conditions (e.g., quality of the food, room temperatures, not receiving hygiene items, complaints regarding staff, visitor restrictions that are incorrectly imposed) shall be responded to by the Department of Community Health (DCH), using the patient grievance process developed by DCH. Grievances answered at the Step III level by the Director of the Bureau of Forensic Mental Health Services shall be forwarded to the Prisoner Affairs Section, OPS, for record keeping.

Grievance Coordinators

P. In SAI and in each CFA institution, the Warden shall designate at least one staff member to serve as Step I and Step II Grievance Coordinators. The FOA Deputy Director shall designate staff members to serve as Step I and Step II Grievance Coordinators for each FOA field office, corrections center and Technical Rule Violation Center (TRV).

Step I Grievance Coordinator

Q. The responsibilities of the Step I Grievance Coordinator shall include:

1. Logging in and assigning a number to each Step I grievance, including those which may be rejected or returned to the grievant for any reason. Where available, the Grievance Coordinator shall use the computerized grievance tracking system to log in and assign numbers to Step I grievances.
2. Rejecting grievances consistent with this policy and returning to the grievant with explanation as to the reason for rejection.
3. Reviewing each grievance accepted at Step I and assigning a respondent to interview the grievant and prepare a written response to the grievance.
4. Ensuring that a response is prepared for each Step I grievance accepted, that a thorough investigation of the grievance is completed, and that the response is reviewed by the respondent's supervisor and is returned to the Grievance Coordinator within the prescribed time limits.

5. Preparing and submitting monthly reports to the Prisoner Affairs Section, OPS, as directed by the OPS Administrator.

6. Processing extension requests as set forth in Paragraph V.

7. Processing Step III responses returned from the Prisoner Affairs Section, OPS.

R. The Grievance Coordinator may respond at Step I to grievances which can be responded to with minimal investigation or rejected for reasons authorized by this policy. However, if the Grievance Coordinator responds to the merits of the grievance, a grievance interview must be conducted as required in Paragraph AA.

Step II Grievance Coordinator

S. The responsibilities of the Step II Grievance Coordinator shall include:

1. Logging in each Step II grievance, including those which may be rejected or returned to the grievant for any reason. Where available, the Grievance Coordinator shall use the computerized grievance tracking system to log in Step II grievances.

2. Rejecting grievances consistent with this policy and

returning to the grievant with explanation as to the reason for rejection.

3. Reviewing each grievance accepted at Step II and assigning a respondent.

4. Ensuring that a response is prepared for each Step II grievance accepted, that further investigation is completed as needed, and the grievance is returned to the coordinator within the prescribed time limits.

GRIEVANCE PROCESS

T. In an effort to resolve grievable issues as soon as possible, prior to submitting a written grievance, the grievant shall attempt to verbally resolve the issue with the staff member involved within two business days after becoming aware of a grievable issue, unless prevented by circumstances beyond his/her control. If the complaint is not resolved, the grievant may file a Step I grievance. A Step I grievance also may be filed in accordance with OP 03.02.130-A "State Administrative Board Prisoner Property Reimbursement" if the grievance is seeking reimbursement for property lost or destroyed while in the Department's sole possession. If the grievant is dissatisfied with

the Step I response, or does not receive a timely response, s/he may appeal to Step II. If the grievant is dissatisfied with the Step II response, or does not receive a timely response, s/he may appeal to Step III.

U. The grievant shall use the Prisoner/Parolee Grievance form (CSJ-247A) to file a Step I grievance and the Prisoner/Parolee Grievance Appeal form (CSJ-247B) to file a Step II or Step III grievance. The information provided shall be limited to the issue being grieved, and shall be as specific as possible. Information shall be confined to the form and shall not be written on the back, sides or margins of the form, or in the response area. Additional pages may be attached, if necessary. However, grievants are encouraged to limit the information to the grievance form. If additional pages are used, the grievant shall submit four copies of each additional page. Grievants may handwrite the grievance provided the handwriting is legible.

V. The total grievance process from the point of filing a Step I grievance to providing a Step III response shall be completed within 90 calendar days unless an extension of 15 business days has been requested by the Grievance

Coordinator or the Prisoner Affairs Section at one of the steps in the grievance process, and has been granted by the grievant. The Grievance Coordinator shall provide the grievant with a copy of the approval with the grievance response. If an extension is requested by the Grievance Coordinator or the Prisoner Affairs Section, but it is not granted by the grievant, the respondent shall note this in the response. Time limitations shall be adhered to by the grievant and staff in all steps of the grievance process.

W. If a grievant chooses to pursue a grievance which has not been responded to by staff within the required time frames set forth below, the grievant may forward the grievance to the next step of the grievance process within ten business days after the response deadline expired, including any extensions which have been granted.

X. Prisoners and staff who may be involved in the issue being grieved shall not participate in any capacity in the grievance investigation, except as necessary to provide information to the respondent.

Step I

Y. Within five business days after discussing a grievable issue with

staff, a grievant may submit a completed Prisoner/Parolee Grievance form (CSJ-247A) to the Step I Grievance Coordinator designated for the facility, field office or other office being grieved. If the office being grieved does not have a designated Grievance Coordinator, the grievant shall submit the grievance to the Step I Grievance Coordinator for the facility in which s/he is housed or appropriate field office for processing.

Z. The Grievance Coordinator shall assign an appropriate respondent and identify the date by which the response is due. If the issue is of an emergent nature, the Grievance Coordinator may order a Step I response within two business days. The respondent shall generally be the supervisor of the person being grieved. The respondent for grievances involving hearing officers or hearings conducted by the Office of Policy and Hearings shall be the Administrator of the Office of Policy and Hearings or designee. The respondent for grievances involving the Parole Board shall be the Parole Board Chairperson or designee.

AA. The grievant shall be interviewed by the respondent unless the grievant refuses to participate in

the interview, or the respondent is not assigned to the location at which the prisoner is confined or does not have ready access to the FOA office to which the parolee is assigned. If the grievant is not interviewed, the reason shall be included in the written response to the grievance. The grievant shall have the opportunity to explain the grievance more completely at the interview, enabling the Step I respondent to gather any additional information needed to respond to the grievance. The interview also provides the opportunity to resolve the grievance to the mutual satisfaction of the grievant and the Department.

BB. The Step I respondent shall identify in the response the policies, rules or procedures that are directly related to the issue or conduct being grieved. Each Step I grievance response shall be reviewed by the respondent's supervisor prior to the grievance being returned to the Step I Grievance Coordinator to ensure that it appropriately addresses the issue raised in the grievance and accurately reflects Department policy and procedure. Where there is limited staffing in an FOA field office, corrections center or TRV, the requirement

for supervisory review of a Step I response shall not apply if the response is prepared by an FOA supervisor/manager.

CC. A Step I grievance response shall be returned to the grievant by the Step I Grievance Coordinator within 15 business days after receipt of the grievance, unless an extension has been granted pursuant to Paragraph V.

Step II

DD. If a grievant is dissatisfied with the response received at Step I, s/he may request a Prisoner/Parolee Grievance Appeal form (CSJ-247B) from the Step I Grievance Coordinator within five business days after receiving the Step I response. The grievant must submit the completed form CSJ-247B to the Step II Grievance Coordinator designated for the facility, field office or other office being grieved within five business days after receiving the CSJ-247B from the Step I Grievance Coordinator.

EE. The Grievance Coordinator shall assign an appropriate respondent and indicate the date by which the response is due. The respondents for Step II grievances shall be as follows:

1. The Warden in CFA facilities and SAI, except that s/he

may delegate this responsibility to the appropriate Deputy Warden if more than one institution is supervised. If the Warden supervises a camp, s/he may delegate this responsibility for camp grievances to the Assistant Deputy Warden at the camp.

2. The appropriate Area Manager for FOA area offices, corrections centers and TRVs.

3. The Regional Health Administrator or designee in grievances alleging inadequate medical care.

4. The Administrator of the Bureau of Correctional Industries or designee for grievances involving that Bureau.

5. The Administrator of the Office of Policy and Hearings for grievances involving that Office.

6. The Parole Board Chairperson for grievances involving the Parole Board.

7. The Regional Business Manager for Region III, CFA, in grievances involving administrative support functions for CFA facilities in Jackson.

FF. A Step II grievance response shall be returned to the grievant by the Step II Grievance Coordinator

within 15 business days after receipt of the Step II grievance, unless an extension is granted pursuant to Paragraph V.

Step III

GG. If a grievant is dissatisfied with the response received at Step II, s/he may file a Step III grievance by completing a Prisoner/Parolee Grievance Appeal form (CSJ-247B) and submitting it to the Prisoner Affairs Section, OPS, within ten business days after receiving the Step II response.

HH. The Director or designee shall be the respondent for Step III grievances.

II. A grievant may file a grievance alleging racial or ethnic discrimination and staff brutality or corruption directly to Step III. A grievant also may file a grievance directly to Step III regarding his/her removal as a housing unit representative by the Warden or CFA Deputy Director pursuant to PD 04.01.150 "Prisoner Representatives". Upon receipt, the grievance shall be carefully reviewed to determine whether to respond directly to the grievance, request an investigation into the issue raised in the grievance, or return it to the grievant for filing at Step I.

MODIFIED ACCESS

JJ. A prisoner or parolee who files an excessive number of grievances which are frivolous, vague, duplicative, non-meritorious, raise non-grievable issues, or contain prohibited language as set forth in Paragraph G, or who files an unfounded grievance as set forth in Paragraph K, may have access to the grievance process limited by the Warden or FOA Area Manager for an initial period of not more than 90 days. If the prisoner or parolee continues to file such grievances while on modified access, the Warden or FOA Area Manager may extend the prisoner's or parolee's modified access status for not more than an additional 30 days for each violation.

KK. The Warden or FOA Area Manager, as appropriate, shall ensure that a prisoner or parolee placed on modified access, or who that status extended, is immediately notified in writing of this determination. The Warden or FOA Area Manager also shall immediately notify the Prisoner Affairs Section, OPS, in writing whenever s/he places a prisoner or parolee on modified access or extends that status.

LL. The Prisoner Affairs Section, OPS, also may place a prisoner or parolee on modified access for the reasons set forth in Paragraph JJ. The Prisoner Affairs Section shall immediately notify in writing each prisoner or parolee it places on modified access or who has that status extended. The Prisoner Affairs Section also shall immediately notify the appropriate Warden or FOA Area Manager in writing of this determination.

MM. While on modified access, the prisoner or parolee shall be able to obtain grievance forms only through the Step I Grievance Coordinator. A grievance form shall be provided if the Step I Grievance Coordinator determines that the issue the prisoner or parolee wishes to grieve is grievable and otherwise meets the criteria outlined in this policy. The Grievance Coordinator shall maintain a record of requests received for grievance forms and whether the request was approved or denied. If a prisoner or parolee on modified access attempts to file a grievance using a form not provided by the Grievance Coordinator, the prisoner or parolee shall be notified that the grievance will not be processed.

The Warden or FOA Area Manager also may extend the prisoner's or parolee's modified access status for not more than an additional 30 days for each violation.

NN. A prisoner or parolee shall remain on modified access for the approved period even if transferred to another facility.

OPERATING PROCEDURE

OO. The OPS Administrator shall ensure that within 60 days of its effective date operating procedures necessary to implement this policy directive is developed.

III. AUDIT ELEMENTS:

PP. A Primary Audit Elements List has been developed and will be provided to Wardens, the SAI Administrator, FOA Regional Administrators and the OPS Administrator to assist with self audit of this policy, pursuant to PD 01.05.100 "Self Audit of Policies and Procedures".

APPROVED: /s/ Bill Martin 10/9/00

Bill Martin, Director Date

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

JOHN H. WALTON,

Plaintiff,

v.

BARBARA BOUCHARD, et al.,

Defendants. /

Case No. 2:02-cv-117
HON. GORDON J. QUIST

REPORT AND RECOMMENDATION

Plaintiff John H. Walton, an inmate at the Alger Maximum Correctional Facility (LMF), filed this *pro se* civil rights action pursuant to 42 U.S.C. § 1983 against defendants Warden Barbra Bouchard, Deputy Warden Ken Gearin, ADW D. Bergh, ADW Ron Bobo, ROM Cathy Bauman, and Case Manager Denise Gerth.

Plaintiff alleges that he was discriminated against based upon his race when he was given an indefinite upper slot restriction after assaulting an officer. Plaintiff, who is black, has asserted that white prisoners who assaulted officers received an upper slot restriction for only a limited time period. Plaintiff names two white prisoners who assaulted officers and were given upper slot restrictions that have now been lifted.

Defendants move to dismiss the complaint for failure to exhaust grievance remedies. Pursuant to 42 U.S.C. § 1997e(a), a prisoner bringing an action with respect to prison conditions under 42 U.S.C. § 1983 must exhaust available administrative remedies. *See Porter v. Nussle*, 534 U.S. 516, 122 S. Ct. 983 (2002); *Booth v. Churner*, 532

U.S. 731 (2001). A prisoner must exhaust available administrative remedies, even if the prisoner may not be able to obtain the specific type of relief he seeks in the state administrative process. *See Porter*, 122 S. Ct. at 988; *Booth*, 532 U.S. at 741; *Knuckles El v. Toombs*, 215 F.3d 640, 642 (6th Cir.), *cert. denied*, 531 U.S. 1040 (2000); *Freeman v. Francis*, 196 F.3d 641, 643 (6th Cir. 1999). A district court must enforce the exhaustion requirement sua sponte. *Brown v. Toombs*, 139 F.3d 1102, 1104 (6th Cir.), *cert. denied*, 525 U.S. 833 (1998); *accord Wyatt v. Leonard*, 193 F.3d 876, 879 (6th Cir. 1999).

After defendants filed their motion to dismiss, plaintiff for the first time submitted copies of the grievances that he filed on this issue. Plaintiff did file a grievance through Step III of the grievance process asserting that he was discriminated against due to his race when he received an indefinite upper slot restriction. Plaintiff, however, only filed his grievance against defendant Bobo. Plaintiff failed to mention the other named defendants in his grievances, even after the Step I response informed plaintiff that defendant Gearin was responsible for giving him the restriction.

Because Plaintiff exhausted his claim against only one of the named Defendants, the court can dismiss this action pursuant to the "total exhaustion" rule. Under the total exhaustion rule, the presence of an unexhausted claim results in the dismissal of the entire action. Currently, a split exists in this District concerning the validity of the "total exhaustion" interpretation of 42 U.S.C. § 1997e(a). *Smeltzer v. Hook*, 235 F. Supp. 2d 736 (W.D. Mich. 2002) (applying total exhaustion rule) (comparing *Keenan v. Twommy*, No. 1:97-cv-549 (W.D. Mich. July 29, 1999) (applying total exhaustion rule) with *Jenkins v. Toombs*,

32 F. Supp. 2d 955 (W.D. Mich. 1999) (rejecting total exhaustion rule). In *Knuckles El v. Toombs*, 215 F.3d 640, 642 (6th Cir. 2000), *cert. denied* 531 U.S. 1040, 121 S. Ct. 634 (2000), the Sixth Circuit "reserve[d] to another day the question of whether 'exhausted claims' in a 'mixed complaint' should be addressed when such claims would otherwise meet the pleading requirement or whether such claims should be dismissed in their entirety."

In *Smeltzer*, the court noted that the majority of courts that have addressed the issue have applied the total exhaustion rule. 235 F. Supp. 2d at 743. In addition, the court noted that the total exhaustion rule is supported both by the plain meaning of 42 U.S.C. § 1997e(a) and strong policy interests. *Smeltzer*, 235 F. Supp. 2d at 743. Section 1997e(a) provides, "No *action* shall be brought with respect to prison conditions under section 1983 of this title . . . until such administrative remedies as are available are exhausted." 28 U.S.C. § 1997e(a). As noted in *Smeltzer*, Congress indicated that a prisoner is required to exhaust all claims before his action may proceed by using the word "action" instead of "claim." *Smeltzer*, 235 F. Supp. 2d at 744.

As noted by the court in *Smeltzer*, if Congress had intended to permit the piecemeal adjudication of claims relating to prison conditions, the statute would have precluded the bringing of unexhausted *claims* rather than *actions*. 235 F. Supp. 2d at 744 (emphasis in original). Section 1997e(c)(1) provides that the district court shall dismiss any "action" which is frivolous, malicious, or fails to state a claim. In contrast, § 1997e(c)(2) provides that the district court may dismiss a "claim" which is frivolous, malicious or fails to state a claim without first requiring exhaustion of administrative remedies. It is apparent that

Congress realized that requiring dismissal without prejudice under § 1997(a) might prevent a court from dismissing with prejudice for frivolousness or failure to state a claim. Therefore, Section 1997e(c)(2) serves to reconcile § 1997(a) and § 1997(e)(1) by permitting a court to dismiss an unexhausted claim as frivolous, thus preventing an unexhausted claim from 'holding up' the dismissal of a frivolous action comprising otherwise exhausted claims." *Smeltzer*, 235 F. Supp. 2d at 744.

In *Smeltzer*, the court noted that the general intent of the PLRA and other strong policy arguments offer additional support for a total exhaustion rule. As noted by the Eleventh Circuit, Congress amended § 1997e(a) largely in response to concerns about the heavy volume of frivolous prison litigation in the federal courts. *Smeltzer*, 235 F. Supp. 2d at 744 (citing *Alexander v. Hawk*, 159 F.3d 1321, 1326 n.11 (11th Cir. 1998) (citing 141 Cong. Rec. H14078-02, *H14105 (daily ed. Dec. 6, 1995)). "Congress desired 'to wrest control of our prisons from the lawyers and the inmates and return that control to competent administrators appointed to look out for society's interests as well as the legitimate needs of prisoners.'" *Id.* (quoting 141 Cong. Rec. S14408-01, *S14418 (daily ed. Sept. 27, 1995)).

The total exhaustion rule advances the goals of the PLRA by discouraging frivolous prisoner litigation and conserving judicial resources. *Smeltzer*, 235 F. Supp. 2d at 744-45. The total exhaustion rule also discourages prisoners from bringing unexhausted or frivolous claims. If only the unexhausted claims were dismissed from a mixed complaint, there is nothing to deter prisoners from raising unexhausted claims indiscriminately. Moreover, the assessment of a second filing fee after the prisoner has

properly exhausted all of his claims also serves as a deterrent against filing unexhausted or frivolous claims. *Smeltzer*, 235 F. Supp. 2d at 745.

In addition, the court in *Smeltzer* held that application of a total exhaustion rule in the civil rights context promotes comity in much the same way as in the habeas corpus context, where the total exhaustion rule is clearly established. 235 F. Supp. 2d at 745. Regarding the amendments by the PLRA to § 1997e(a), the *Smeltzer* court quoted *Brown v. Toombs*, 139 F.3d at 1103, as follows:

> The new statute has extensive benefits. It recognizes that it is difficult to explain why we require full exhaustion in habeas corpus cases involving life and liberty, but allow direct access in prison cases under § 1983. As Justice Stewart stated in *Preiser v. Rodriguez*, 411 U.S. 475, 491-92, 36 L. Ed. 2d 439, 93 S. Ct. 1827 (1973):
>
> > Since these internal problems of state prisons involve issues so peculiarly within state authority and expertise, the states have an important interest in not being bypassed in the correction of these problems. Moreover, because most potential litigation involving state prisoners arises on a day to day basis, it is most efficient and properly handled by the state administrative bodies and the state courts, which are for the most part, familiar with the grievances of state prisoners and in a better physical and practical position to deal with these grievances.

Smeltzer, 235 F. Supp. 2d at 745.

As concluded by the court in *Smeltzer*, the principles of comity require that prison officials have a full opportunity to address claims raised by prisoners before they are brought to federal court. "By requiring total exhaustion, the federal courts not only will promote comity, but also will reap the benefits of 'more focused complaints and more developed evidentiary records.'" *Smeltzer*, 235 F. Supp. 2d at 745 (citing *Rivera v. Whitman*, 161 F. Supp. 2d 337, 343 (D.N.J. 2001).

Moreover, in *Storey v. Hutchinson*, 56 Fed. Appx. 228 (6th Cir. 2003), the Sixth Circuit recently affirmed the dismissal of a prisoner civil rights complaint for lack of complete exhaustion of remedies. 56 Fed. Appx. at 229. In *Storey*, the Plaintiff had submitted affidavits that no grievance procedure was available to him, but later recanted and filed documents showing that he had exhausted his available remedies as to some of the many claims he raised. The district court dismissed the suit pursuant to 42 U.S.C. § 1997e because of Plaintiff's failure to show that he had exhausted all available administrative remedies. *Id.* In affirming the dismissal, the court stated that the PLRA requires a prisoner to exhaust all available administrative remedies before filing a civil rights action in federal court, and that when a prisoner fails to exhaust his administrative remedies before filing his complaint, or only partially exhausts his remedies, dismissal of the complaint is appropriate. *Id.*

Plaintiff has filed separate requests for summary judgment in his favor because he asserts that he exhausted his grievance remedies. Plaintiff adopts defendants' motion to dismiss as support for his claim of entitlement to summary judgment. First, plaintiff has not completely exhausted his grievance remedies against each

of the named parties. Second, even if he did exhaust grievance remedies, exhausting grievance remedies does not provide a necessary factual basis to prevail on the merits of the claim. Plaintiff has failed to show that no genuine issue of material fact exists for trial and that he is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986).

Accordingly, it is recommended that defendants' motion to dismiss (Docket #32) be granted, dismissing plaintiff's complaint without prejudice for failure to exhaust grievance remedies. It is further recommended that plaintiff's motions for summary judgment (Docket ## 36, 45 and 56) be denied.

NOTICE TO PARTIES: Objections to this Report and Recommendation must be served on opposing parties and filed with the Clerk of the Court within ten days of your receipt of this Report and Recommendation. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b); W.D. Mich. LCivR. 72.3(b). Failure to file timely objections constitutes a waiver of any further right to appeal of those issues or claims addressed or resolved as a result of the Report and Recommendation. *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). *See also Thomas v. Arn*, 474 U.S. 140 (1985).

/s/ Timothy P. Greeley
Timothy P. GREELEY
UNITED STATES
MAGISTRATE JUDGE

Dated: July 28, 2003

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

JOHN H. WALTON,

Plaintiff,

v.

Case No. 2:02-cv-117
HON. GORDON J. QUIST

BARBARA BOUCHARD, et al.,

Defendants. /

OPINION AND ORDER APPROVING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

The Court has reviewed the Report and Recommendation filed by the United States Magistrate Judge in this action on July 28, 2003. The Report and Recommendation was duly served on the parties. The Court has received objections from the plaintiff. In accordance with 28 U.S.C. § 636(b)(1), the Court has performed *de novo* consideration of those portions of the Report and Recommendation to which objection has been made. The Court now finds the objections to be without merit.

Plaintiff argues that his complaint should not be dismissed for failure to exhaust grievance remedies. Plaintiff exhausted his grievance remedies against only one of the named defendants. Plaintiff failed to exhaust his grievance remedies against each of the named defendants. The Magistrate Judge recommended dismissal under the total exhaustion rule. Plaintiff's objection urges the court not to adopt a total exhaustion rule. However, since the total exhaustion rule advances the goals of the Prisoner Litigation Reform Act, plaintiff's complaint is

dismissed for failure to exhaust his grievance remedies. *Storey v. Hutchinson*, 56 Fed. Appx. 228(6th Cir. 2003); *Smeltzer v. Hook*, 235 F.Supp. 2d 736 (W.D. Mich. 2002).

THEREFORE, IT IS ORDERED that the Report and Recommendation of the Magistrate Judge is approved and adopted as the opinion of the court.

The court must next decide whether an appeal of this action would be in good faith within the meaning of 28 U.S.C. § 1915(a)(3). *See McGore v. Wrigglesworth*, 114 F.3d 601, 611 (6th Cir. 1997). For the same reasons that the court grants defendants' motion to dismiss, the court discerns no good-faith basis for an appeal. Should the plaintiff appeal this decision, the court will assess the $105 appellate filing fee pursuant to § 1915(b)(1), *see McGore*, 114 F.3d at 610-11, unless plaintiff is barred from proceeding *in forma pauperis*, e.g., by the "three-strikes" rule of § 1915(g). If he is barred, he will be required to pay the $105 appellate filing fee in one lump sum.

Dated: October 14, 2003

/s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

JOHN H. WALTON,

Plaintiff,

v.

BARBARA BOUCHARD, et al.,

Defendants. /

Case No. 2:02-cv-117
HON. GORDON J. QUIST

JUDGMENT

In accordance with the Opinion and Order entered this date,

IT IS HEREBY ORDERED that defendants' motion to dismiss (Docket #32) is granted, and this case is DISMISSED without prejudice for failure to exhaust grievance remedies.

IT IS FURTHER ORDERED that plaintiff's motions for summary judgment (Docket ##36, 45 and 56) are denied.

Dated: October 14, 2003

/s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES
DISTRICT JUDGE

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
File Name: 05a0515n.06
Filed: June 17, 2005

No. 03-2458

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOHN H. WALTON, Plaintiff-Appellant, v. BARBARA BOUCHARD, KEN GEARIN, D. BERGH, CATHERINE BAUMAN, and DENISE GERTH, Defendants-Appellees.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

Before: GIBBONS and SUTTON, Circuit Judges; EDGAR, District Judge.*

SUTTON, Circuit Judge. John Walton, an inmate at the Alger Maximum Correctional Facility in Munising, Michigan, filed this § 1983 action claiming racial discrimination by several prison employees. The district court granted the employees' motions to dismiss on procedural, not substantive, grounds, determining that Walton did not exhaust his administrative remedies as to each defendant named in the suit in accordance with 42 U.S.C. § 1997e(a). On the basis of § 1997e(a) and this court's recent decision

* The Honorable Robert Allan Edgar, Chief United States District Court Judge for the Eastern District of Tennessee, sitting by designation.

in *Jones Bey v. Johnson*, 407 F.3d 801 (6th Cir. 2005), we affirm.

I.

On July 17, 2001, the prison punished Walton for assaulting a prison officer by giving him a sanction referred to as an "upper slot restriction" for an indefinite period of time. Nearly a year later, in early April 2002, Walton, an African American, filed a prison grievance charging Assistant Deputy Warden (ADW) Ron Bobo with racial discrimination for giving him the indefinite upper slot restriction. Walton claims that while white prisoners were given definite upper slot restrictions (30 or 60 days at most) for similar assaults, he was given an indefinite restriction. In support of his claim, he identified a white prisoner who had received a definite upper slot restriction for a similar infraction. In Step I of the prison's grievance process, he charged only Bobo with responsibility for the incident. The prison responded to his grievance by stating that ADW Ken Gearin had placed Walton on an indefinite upper slot restriction and that racial discrimination had nothing to do with Gearin's decision. Such restrictions, the prison explained, are imposed individually and one prisoner's restriction does not affect the discipline that another prisoner receives.

Walton appealed his claim to Step II of the grievance process, restating his allegations from Step I and claiming racial discrimination on the part of "corrupt administration[] heads, warden, et[] al[.]" Prisoner Grievance Appeal Form at Step II (contained in Walton Reply Br. at 14). The prison responded that Walton had failed to present any

new evidence at Step II and that its Step I response adequately addressed Walton's allegations.

Walton appealed to Step III of the grievance process, the final level of appeal. In addition to restating his earlier allegations, he identified an additional white prisoner who was given a definite upper slot restriction for misconduct that allegedly paralleled Walton's misconduct. The prison denied the Step III appeal, stating that the responses in Steps I and II adequately addressed Walton's concerns.

Having obtained no relief in the grievance process, Walton filed this action under § 1983 and the Fourteenth Amendment against Warden Barbara Bouchard, ADW Gearin, ADW Bergh, prison employee Cathy Bauman, case manager Denise Gerth and ADW Bobo. In his request for relief, he asked the court to order the defendants to remove the upper slot restriction and to order each of the defendants to pay him up to $750,000 in compensatory and punitive damages.

At the time Walton filed this complaint, several district courts within this circuit had reached different conclusions about whether the Prison Litigation Reform Act (PLRA), *see* 42 U.S.C. § 1997e(a), required the dismissal of a prisoner's complaint if it contained both exhausted and unexhausted claims. The district court in this case sided with the total-exhaustion school of thought and dismissed Walton's complaint without prejudice for his failure to exhaust administrative remedies against each named defendant. Guided by our recent decision in *Jones Bey*, we now follow the same path and affirm.

II.

We give fresh review to a district court's dismissal of an action for failure to exhaust administrative remedies. *Curry v. Scott*, 249 F.3d 493, 503 (6th Cir. 2001). Exhaustion of administrative remedies is mandatory, we have said, "even if proceeding through the administrative system would be futile," *Jones Bey*, 407 F.3d at 805 (quotations and citation omitted), and even if the defendant does not raise the defense, *see Burton v. Jones*, 321 F.3d 569, 574-75 (6th Cir. 2003) (noting that a district court should "enforce the exhaustion requirement *sua sponte*, if not raised by the defendants"). The inmate bears the burden of establishing that he has exhausted his administrative remedies. *Brown v. Toombs*, 139 F.3d 1102, 1104 (6th Cir. 1998).

Under the PLRA, "[n]o *action* shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a) (emphasis added). In view of the exhaustion provision's reference to "action" and the PLRA's other reference to "claim," 42 U.S.C. § 1997e(c)(2), another panel of this court recently interpreted § 1997e(a) to "require[] a complete dismissal of a prisoner's complaint when that prisoner alleges both exhausted and unexhausted claims." *Jones Bey*, 407 F.3d at 805.

We also have previously held that a prisoner must "file a grievance against the person he ultimately seeks to sue." *Curry*, 249 F.3d at 505. Such a requirement is consistent with the aims of the PLRA as it gives the prison administrative system "a chance to deal with claims

against prison personnel before those complaints reach federal court." *Id.* And not only must the prisoner file a grievance with regard to each defendant, he "must administratively exhaust his . . . claim as to each defendant associated with the claim." *Burton*, 321 F.3d at 574. In order to exhaust "a claim against a particular defendant, a prisoner must have alleged mistreatment or misconduct on the part of the defendant at Step I of the [Michigan Department of Corrections] grievance process." *Id.* at 575. *See id.* at 574 ("By negative implication, we understand these [Michigan] policies to preclude administrative exhaustion of a claim against a prison official if the first allegation of mistreatment or misconduct on the part of that official is made at Step II or Step III of the grievance process.").

Walton has not satisfied these requirements. He named only ADW Bobo in Step I of his grievance process, and under our precedent that is the only claim that we may consider exhausted. *See id.*; *see also Curry*, 249 F.3d at 505. His claims as to all other defendants remain unexhausted and accordingly the district court properly dismissed the entire complaint under *Jones Bey's* total-exhaustion requirement.

In his pro se brief on appeal, Walton argues that by mentioning "corrupt administration[ ] heads, warden, et[ ] al[.]" during the grievance process, he gave any unnamed party notice of the allegations because the prison at that point could have determined which prison employees were involved in the incident. But Walton's reference to "corrupt administration[ ] heads, warden, et[ ] al[.]" came at Step II of the process, not Step I – the step at which a prisoner generally must name each defendant. *Burton*, 321 F.3d at 575. And in response to his Step I grievance, the prison

gave Walton all of the information that he needed to comply with this requirement. Far from leaving Walton in the dark as to which prison officials were responsible for his alleged mistreatment, the prison told him that ADW Gearin gave him the upper slot restriction. At that point, Walton was armed with all of the information that he needed to file a Step I grievance against ADW Gearin – and a federal complaint against Gearin once the claim had been exhausted – but he simply chose not to follow this route. Even if we took the view, moreover, that the prison's acknowledgment that ADW Gearin was responsible for Walton's upper slot restriction establishes that Walton adequately exhausted his claim against Gearin, it would not establish that Walton exhausted his claims against the other defendants by identifying them by name or position in Step I of the grievance process.

III.

For these reasons, we affirm the district court's dismissal of Walton's complaint without prejudice.

Supreme Court, U.S.
FILED
AUG 14 2006
OFFICE OF THE CLERK

(3) (3)

Nos. 05-7058 and 05-7142

In The Supreme Court of the United States

LORENZO L. JONES,

Petitioner,

v.

BARBARA BOCK, *et al.*,

Respondents.

TIMOTHY WILLIAMS and JOHN H. WALTON,

Petitioners,

v.

WILLIAM OVERTON and BARBARA BOUCHARD, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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Volume II

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Petition For Certiorari In 05-7058 Filed October 13, 2005
Petition For Certiorari In 05-7142 Filed October 17, 2005
Certiorari Granted In Both Cases March 6, 2006

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* Any spelling, punctuation, or grammatical errors found in the following Joint Appendix pages were intentionally left to show accurately how the original documents appeared.

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MICHIGAN DEPARTMENT OF CORRECTIONS
PRISONER/PAROLEE GRIEVANCE FORM

4835-4247 10/94
CSJ-247A

Date Received at Step I _____ Grievance Identifier: |_|_|_|_|_|_|_|_|_|_|_|_|_|_|

Be brief and concise in describing your grievance issue. If you have any questions concerning the grievance procedure, refer to PD 03.02.130 and OP 03.02.130 available in the prison Law Library.

Name (print first, last)	Number	Institution	Lock Number	Date of Incident	Today's Date
Lorenzo L. Jones/Johnson	176204	SRF	98-1200	8/20/01	9/15/01

What attempt did you make to resolve this issue prior to writing this grievance? On what date? 8/29/01
If none, explain why. "On 8/29/01 Plaintiff talked ### to the Classification Director whom at the time ######### informed Plaintiff that he should write a grievan This grievance is being written on the following staff members: Classificati Director, Health Care, Warden, Deputy Warden and ########Officer Opanasenko, their professional capacity.

State problem clearly. Use separate grievance form for each issue. Additional pages, using plain paper, may be used. Four copies of each page and supporting documents must be submitted with this form. The grievance must be submitted to the Grievance Coordinator in accordance with the time limits of OP 03.02.130.

On July 19,2001, Plaintiff was assigned to work yard crew as an equipment handler, "meaning" Plaintiff was to hand at prisoners request, horse shoes, baseball bag (that's full of gloves, balls and two bats), basket balls, etc. While on this job, Plaintiff informed supervising officer Opanasenko (E-9), that Plaintiff was unable to handle certain equipment, such as picking up horse shoes, and baseball bag or to stand around the recreation shack for long periods of time or bending and stooping. This officer began to harass Plaintiff the same day Plaintiff worked out in the shack. Plaintiff informed a staff member that officer Opanasenko did not like him. Plaintiff will provide this officer name when he see the office, because Plaintiff does not know it right off. However, officer Opanasenko, insisted that Plaintiff pick these things up and hand them to the requesting prisoners, and stand around for 15 to 20 minutes waiting on someone to request equipment. This caused a conflict between this officer and Plaintiff. Officer Opanasenko went so far as to fabricate an assignment evaluation form, fraudulently falsified the written statement on the bottom of the work assignment evaluation, alleging that Plaintiff wrote: "I would like to be removed from this detail".

Grievant's Signature

grievance continue on page -1-

RESPONSE (Grievant Interviewed? ☐ Yes ☐ No If No, give explanation. If resolved, explain resolution.)

See Attached Respond

Respondent's Signature	Date	Reviewer's Signature	Date
Respondent's Name (Print)	Working Title	Reviewer's Name (Print)	Working Title

Date Returned to Grievant	If resolved at Step I, Grievant sign here. Resolution must be described above.	Grievant's Signature	Date

DISTRIBUTION: White, Green, Canary, Pink--Process to Step One; Goldenrod--Grievant

as that of Plaintiff's writing, although Plaintiff signed the document as required by Classification not to be Doubled Oed, Plaintiff did not write said statement as indicated on evaluation form, officer Opanasenko also involved a Lieutenant in an attempt to have Plaintiff placed in Segregation by writing a Threaten behavior misconduct on Plaintiff, although the misconduct was never written, Plaintiff was interviewed by said Lieutenant stating that when Plaintiff refused to pick up requested equipment that Plaintiff was threatening towards him (officer Opanasenko), although at the time Plaintiff had on a neck brace and walked with a cane. NOTE: the Lieutenant became involved the day after on August 21,2001, (the incident where Plaintiff refused to lift equipment), when officer Opanasenko told him that while Plaintiff was eating morning chow, Plaintiff was marcating him (officer Opanasenko), stating that Plaintiff stare was threatening him.

At the time of the above incident, Plaintiff was wearing a neck brace and walking with a cane, (although Plaintiff still walk with a cane to this date), due to a November 14,2000 automobile accident in which my neck was broken and I suffered spinal cord injuries. Officer Opanasenko, Classification Director, Deputy Warden, Health Care and Warden were all aware of my current conditions.

The work assignment report will cause Plaintiff irreprisable harm if it remains in Plaintiff prison file, for the Michigan Department of Corrections Parole Board score points for inadequate work performance, this will add to a negative probability for parole for this Plaintiff.

Officer Opanasenko, Health Care, Classification, Deputy Warden and Warden, know, knew or should have known that their actions was in direct violations of plaintiff's, First, Eighth and Fourteenth Amendment Constitutional Rights and Civil Rights, where all the above defendants required Plaintiff to work beyond that of his physical capabilities.

Qualified Immunity would not shields officials from Liability for Civil Damages where their conduct was outside the scope of their duties and violated clearly established Statutory or Constitutional Rights of which a reasonable person would have known.

This matter can be partially resolved by the following: 1). a written apology from all parties involved, officer Opanasenko, Health Care, Classification, Deputy Warden and Warden, the apology can come in one letter with the above defendants names and rank on it, 2). removal of "prisoner program and work assignment evaluation" from all Plaintiff's institutional files, 3). that Plaintiff not be placed on double O status, 4). that Plaintiff will not be required to work unless cleared by personal outside doctor's and 5). no "retaliatory actions" towards Plaintiff person for any reason by any of the above named defendants or their agents or co-workers, and finally, 6). that officer Opanasenko, Health Care (named personnel who cleared Plaintiff for such a job) and Deputy Warden be reprimanded with 7 days off work without pay. Any deviation from the above Voids any agreement between Plaintiff and the defendants.

"Thank You For Your Cooperation"

Lorenzo L. Jones/Johnson
#178204
9625 Pierce
Freeland, Michigan 48623

A-9
02cv74336 DT

Grievance Response

Grievance Number SRF-01-09-01068-02a

GRIEVANT INTERVIEW: Grievant states he has was written a work report which is not appropriate. Grievant stated his only issue is that he was written a "bad" work report that is not true. Grievant was angered that this may affect his upcoming Parole Hearing.

INVESTIGATOR SUMMARY : Prisoner was issued a Prisoner Program and Work Assignment Evaluation on 8-21-01. This evaluation was issued appropriately and contained necessary factual information. Officer Opansenko's evaluation of Prisoner was accurate.

FINDINGS: Michigan Department of Correction Policy Directive 01.04.130 states in part, "A prisoner may challenge the accuracy of factual information in documents prepared by the Department which are contained in the prisoner's files but **may not challenge opinions, impressions and judgements contained in such documents and records."** It is the prisoner's responsibility to present information in support of the challenge. Officer Opansenko's evaluation is considered appropriate. Therefore this grievance is denied.

MICHIGAN DEPARTMENT OF CORRECTIONS
PRISONER/PAROLEE GRIEVANCE APPEAL FORM

4835-4248 12/97
CSJ-247 B

Date Received by Grievance Coordinator at Step II: _____

Grievance Identifier SRF-01-09-01068-02a

INSTRUCTIONS: THIS FORM IS ONLY TO BE USED TO APPEAL A STEP I GRIEVANCE.
The white copy of the Prisoner/Parolee Grievance Form CSJ-247A (or the goldenrod copy if you have not been provided with a Step I response in a timely manner) **MUST** be attached to the white copy of this form if you appeal it at both Step II and Step III.

If you should decide to appeal the Step I grievance response to Step II, your appeal should be directed to: Warden Bock by 10-18-01 if it is not submitted by this date, it will be considered terminated.

If you should decide to appeal the response you receive at Step II, you should send your Step III Appeal to the Director's Office, P.O. Box 30003, Lansing, Michigan, 48909.

Name (first, last)	Number	Institution	Lock Number	Date of Incident	Today's Date
Jones, Lavenzo	176204	SRF	12-02[illegible]	8-20-01	10-11-01

STEP II--Reason for Appeal /// In responding to Plaintiff grievance, the respondent Sgt F. Yell, failed to answer Plaintiff issues therein: 1. Plaintiff filed the within grievance on "Health Care, Warden Bock, Deputy Warden of Programs, Classification Director and Opanasenko". Although the officer was supervising officer and harassed Plaintiff, the officer was "NOT" the only responsible party therein, Plaintiff was "NOT" medically clear to work such a Job do to his injuries. Therefore making all of the above defendants responsible for placing Plaintiff on such assignment. Where they know, knew or should have known that Plaintiff was physically unable to perform such a duty. Removing the work form is not a cure all in this matter only a step.

STEP II--Response

Date Received by Step II Respondent:

Respondent's Name (Print) | Respondent's Signature | Date

Date Returned to Grievant:

STEP III--Reason for Appeal

NOTE: Only a copy of this appeal and the response will be returned to you.

STEP III--Director's Response is attached as a separate sheet.

If you find the Step III Director's response unsatisfactory, you have the option of referring the grievance to the Office of Legislative Corrections Ombudsman, 4th Floor, Capitol Hall, 115 W. Allegan, Lansing, Michigan, 48913.

DISTRIBUTION: White--Central Office; Green - Canary --Step III; Pink--Step II; Goldenrod--Grievant

Response - Step II Grievance Appeal
SRF-01-09-01068-02a
Jones #176204

Grievant claims that Officer Opanansenko fabricated a negative Work Report. As the Parole Board may issue negative points to Grievant for bad work reports, which in turn may lower his probability of parole, he wants this removed from his files.

The Step I Respondent determined that the Grievant was issued a negative Prisoner Program and Work Assignment Evaluation on 8/21/01. Per PD-01.04.130, Grievant may challenge the accuracy of factual information, but may not challenge opinions, impressions and judgements in such documents and records. The Grievant is responsible for presenting information in support of his challenge. The officer's evaluation was appropriate, and the grievance was denied at Step I.

On appeal to Step II, Grievant alleges that the Step I Respondent did not answer the issues presented (i.e. he only addresses the Officer, and did not address the other parties who were grieved). He also alleges that he was not medically clear to work the detail issued, and the grieved parties knew, or should have known, he could not perform those job duties. Grievant has a Special Accommodation Notice in his file authorizing possession of a neck brace and wooden cane. Step I documents include verification from Health Care that Grievant was physically capable of working this assignment. Further, Classification specifically issued Grievant a detail for Equipment Handler as a light-duty assignment, due to his medical condition. Grievant was appropriately given the job detail; Health Care verified that his medical condition does not preclude him from handing out recreation equipment. The other grieved parties, Warden and ADW of Programs, are not licensed medical staff, therefore they must rely on Health Care's evaluation of the Grievant's medical limitations.

A review if the CAJ-363 work evaluation reveals that the reporting Officer signed the form as both Evaluator and Supervisor. *As the reporting officer should not sign the form in both places, the work report will be removed from Grievant's file. However, the reporting Officer may re-do the CAJ-363 and have the supervisor sign it.*

Staff are reminded that all CAJ-363's should be signed by a supervisor prior to processing through Classification.

Grievance is partially resolved at Step II.

Barbara N. Bock, Warden
Saginaw Correctional Facility
October 30, 2001

cc: Grievance Coordinator - SRF
ADW Chaplin - for action
file

MICHIGAN DEPARTMENT OF CORRECTIONS
PRISONER/PAROLEE GRIEVANCE APPEAL FORM

4835-4248 12/97
CSJ-247 B

Date Received by Grievance Coordinator at Step II: 10/11/01

Grievance Identifier SRF-01-09-01068-02a

INSTRUCTIONS: THIS FORM IS ONLY TO BE USED TO APPEAL A STEP I GRIEVANCE.
The white copy of the Prisoner/Parolee Grievance Form CSJ-247A (or the goldenrod copy if you have not been provided with a Step I response in a timely manner) MUST be attached to the white copy of this form if you appeal it at both Step II and Step III.

If you should decide to appeal the Step I grievance response to Step II, your appeal should be directed to: Warden Bock by 10-18-01 if it is not submitted by this date, it will be considered terminated.

If you should decide to appeal the response you receive at Step II, you should send your Step III Appeal to the Director's Office, P.O. Box 30003, Lansing, Michigan, 48909.

Name (first, last)	Number	Institution	Lock Number	Date of Incident	Today's Date
Jones, Lorenzo	176204	SRF	12-028	8-30-01	10-11-01

STEP II--Reason for Appeal /// In responding to Plaintiff grievance, the respondent Sgt F. Bell, failed to answer Plaintiff issues therein: 1. Plaintiff filed the within grievance on "Health Care, Warden Bock, Deputy Warden of Programs, Classification Director and Opanasenko". Although the officer was supervising officer and harassed Plaintiff, the officer was "NOT" the only responsible party therein, Plaintiff was "NOT" medically clear to work such a Job do to his injuries. Therefore making all of the above defendants responsible for placing Plaintiff on such assignment. Where they know, knew or should have known that Plaintiff was physically unable to perform such a duty. Removing the work form is not a cure all in this matter only a step.

STEP II--Response

Date Received by Step II Respondent: 10/11/01

See attached response.

Respondent's Name (Print)	Respondent's Signature	Date	Date Returned to Grievant:
D. Bock, Warden - SRF	[signature]	10/30/01	10/31/01

STEP III--Reason for Appeal /In Warden Bock response to step two grievance, Warden Bock alleged that Health Service had cleared Plaintiff for work or that the Plaintiff injuries does not preclude Plaintiff from said work assignment. That Health Care verified this. Plaintiff contest that the statement by Warden Bock is "FABRICATED" for SRF Health Service has never examined Plaintiff to make a detail of Plaintiff injuries. Next, Warden Bock attempt to side step and over look the issues at bar. According to the Warden interpretation of

CON ON NEXT PAGE-1

NOTE: Only a copy of this appeal and the response will be returned to you.

STEP III--Director's Response is attached as a separate sheet.

If you find the Step III Director's response unsatisfactory, you have the option of referring the grievance to the Office of Legislative Corrections Ombudsman, 4th Floor, Capitol Hall, 115 W. Allegan, Lansing, Michigan, 48913.

DISTRIBUTION: White--Central Office; Green - Canary --Step III; Pink--Step II; Goldenrod--Grievant

PAGE-1-CONTINUE

D. 01-04-130, a prisoner may challenge the accuracy of factual information contained in a CAJ-363 work evaluation form, but may not challenge opinions, impressions and judgments in such documents.

This interpretation leaves a prisoner who is grieved by a 363 form between a rock and a hard place, for the information contained in such a report could always be interpreted as an opinion, impression or judgment.

Although Warden Bock partially granted Plaintiff relief, Warden Bock nonetheless give the reporting staff member an opportunity to re-write the unlawful CAJ-363 evaluation form, stating that he just could not sign the form in both places. No doubt, the reporting staff will write the exact same evaluation, leaving Plaintiff with no redress.

Plaintiff contest that the information and 363 form should not be re-done for Plaintiff, for it was the fruit of unreasonable practice by the Department of Corrections and it's agents, which violated Plaintiff right to be free of activities that Plaintiff may or may not be physically capable of performing, the first, eighth and fourteen Amendments protests Plaintiff from such practice and harm, and mental and physical damages have been awarded by Courts for such actions.

Next, Warden Bock claimed that "Warden and ADW" are not licensed medical staff, therefore they must rely on Health Care of Grievant's medical limitations and therefore making neither the Warden or ADW Chaplin not responsible, however, Warden Bock failed to realize, that she is the Warden of the institution in which Plaintiff currently reside and Chaplin is the Assistant Deputy Warden, thereby making their failure to "ACT" to a wrong within their control, make them just as responsible, as if directly causing the harm. For each defendant failed to act or rectify the situation.

FURTHER, Warden Bock failed to address the claim that Defendant Opanasenko fraudulently wrote a paragraph at the bottom of the evaluation CAJ-363 form, alleging that Plaintiff himself had written the paragraph. Plaintiff content, that he did not write the paragraph on the CAJ-363 form that the paragraph was forged and the writer of the paragraph should be reprimanded, for it is a violation of the Michigan Department of Correction code of ethics and should not be tolerate by those whom have sworn to up-hold the Laws and Constitutions.

In this case, the stipulation within the grievance has not been resolved as required. In order to resolve this matter, the following conditions must be met: 1). complete removal of the 363 form from all of Plaintiff's prisons files, 2). that plaintiff not be required to work unless cleared by Plaintiff's personal Doctors, Doctor's Mark Jones and Doctor Van der Harst, both are treating physician's of Plaintiff, 3). that officer Opanasenko, Health Care and Deputy Warden Chaplin be reprimanded with a minimum of 7 days "WITHOUT PAY" for their unlawful actions and 4). that no retaliatory actions be taken against Plaintiff by the above named defendants or their co-workers. Any deviation from the above VOIDS any agreement between Plaintiff and the defendants.

Dated: November 2,2001

Respectfully

Mr. Lorenzo L. Jones/Johnson #176204

THIRD STEP GRIEVANCE RESPONSE

Lorenzo Jones, #176204
SRF-01-09-106S-02a

The Grievant presents an issue which alleges that he was written a bad work report that was not true. As his relief, he requested that it be removed from his file. The grievance was processed at the local level according to the provisions of Policy Directive 03.02.130 (Prisoner/Parolee Grievances) and Operating Procedure 03.02.130 (Prisoner/Parolee Grievances).

This investigator has reviewed the documents presented with the appeal to Step Three. All relevant information was considered. Based on this review, this writer finds the responses provided at Step One and Step Two adequately address the merits of the main issue grieved. The facility informed this investigator that the work report had been rewritten, the old one was removed from his file and the new one was added. This grievance is resolved.

Approval Signature: Michael A. Powell Date: DEC 11 2001
#6/12-4/02a

02cv74336
A-3

(Plaintiff Exhibit A-11)
Step one, Two, Three

MICHIGAN DEPARTMENT OF CORRECTIONS
PRISONER/PAROLEE GRIEVANCE FORM

4835-4247 10/94
CSJ-247A

Date Received at Step I 6/13- Grievance Identifier: SMF 02-06-1337-12c

Be brief and concise in describing your grievance issue. If you have any questions concerning the grievance procedure, refer to PD 03.02.130 and OP 03.02.130 available in the prison Law Library.

Name (print first, last)	Number	Institution	Lock Number	Date of Incident	Today's Date
Timothy Williams	173396	SMF	4-121	6-7-02	6-7-02

What attempt did you make to resolve this issue prior to writing this grievance? On what date? 5-30-02
If none, explain why. I was seen by a nurse on 6-2-02. I was supposed to have ~~seen by~~ been seen by a doctor, and as of now not be. ~~have~~ has call me out yet 6-7-02

State problem clearly. Use separate grievance form for each issue. Additional pages, using plain paper, may be used. Four copies of each page and supporting documents must be submitted with this form. The grievance must be submitted to the Grievance Coordinator in accordance with the time limits of OP 03.02.130.

I have requested Medical follow-up care, and have not been ~~seen~~ seen by the doctor, nor have I been treated. I am expriencing a lot of pain from the Tumors in my fingers, hand, and arm. My condition have gotten worst. For example, I am expriencing more pain ~~than~~ ever, ~~my hand~~ I can not open my hand, and the Tumors in my fingers, hand, and Arm hai ~~gotten~~ gotten bigger. I am expriencing ~~Pain~~ nerve pain in my right bicepp up my shoulder, and be-hind ~~my~~ ear and head. SEE Health Care Kite Attached

T Williams
Grievant's Signature

RESPONSE (Grievant Interviewed? ☑ Yes ☐ No If No, give explanation. If resolved, explain resolution.)

Per health record review of prisoner Williams 173396, evaluated by RN on 6/3/02 with information referred to MSP for further recommendations. MSP reviewed notes on 6/6/02 indicating, "All M.D.O.C. M.A.C. appeals were denied. Inform patient need to know how these med work for the pain, M.D.O.C. refused the surgery." On 6/10/02 MSP responded that he reviewed inmate Williams 173396 case and no surgery at this time, and physical therapy not likely to help. Grievant will be scheduled for MSP evaluation on 6/18/02.

Respondent's Signature	Date	Reviewer's Signature	Date
K WRIGHT	RN 13	K. Petera, RN	HLM
Respondent's Name (Print)	Working Title	Reviewer's Name (Print)	Working Title

Date Returned to Grievant: 6/17

If resolved at Step I, Grievant sign here. Resolution must be described above. Refused to sign — Grievant's Signature — 6/17/02 Date

DISTRIBUTION: White, Green, Canary, Pink--Process to Step One; Goldenrod--Grievant

Joint Appendix Page 338

Exh. 6, 2 "A" #2

MICHIGAN DEPARTMENT OF CORRECTIONS
PRISONER STATIONERY

CSJ-110 4/90
4835-3110

TO:			FROM:		
NAME			NAME		
NO. AND STREET OR R.R.			NO.	LOCK	
CITY	STATE	ZIP	INSTITUTION		DATE

IN CORRESPONDENCE, USE NAME AND NUMBER ON YOUR LETTER AND ENVELOPE

2-6-02

To: Standish Health Care Director
Re: Surgery, occupational therapy Eval.

On 10-23-01 an evaluation was done see attached copy; it was done concerning my Rehabilitation needs ect. Therefore my "immediate concern" now is has my surgery been approved & know you cannot tell what date it will take place; however it will allow Dr. Hoffman to upgrade my needs.

Also since my most recent Evaluation Changes have occured, such as Painful episodes at times of sleep, and feel now while I can tell and describe my symptoms something can be done while waiting

Please E-mail or fax a copy of this letter as promptly as possible and return a response, with attachments.
Thank You

You are scheduled for follow-up evaluation within one month.
KW 2/11/02

Mr. T. Williams
#173396

Response to Kite R.N K. Wright

HEALTH CARE REQUEST Exhibit "B"

PRISONER: COMPLETE SECTIONS A THROUGH D

A NAME: T. Williams

NUMBER: 173396 LOCK: 6-144 DATE: 2-12-02

B This Health Care Request is for the following (check one or more): Please Respond by Health care form

☐ Dental ☑ Medical ☐ Mental Health

C I have the following problems/symptoms: R.N Wright — Could you please refer my concern to Dr. Hoffman my level of comfort during time of sleep or during times of relaxed moments, my nerve from my back arm to my shoulder to my ear has very sharp pains what Therapy can you offer? my level of care must be upgraded.

D **NOTICE TO PRISONER**

You will not be denied health care services for lack of personal funds. However, if your account does not have adequate funds, the copayment will be considered an institutional debt and shall be collected as set forth in PD 04.02.105, "Prisoner Funds and Prisoner Organization Accounts".

Signing this document formally requests treatment. In addition, it authorizes the DOC to treat or arrange treatment for you and to release any necessary medical information to facilitate that treatment, to review treatment, to respond to a related grievance, or to review any appeal you may make regarding the Department's decision to charge for the care.

I have read Section D above, or it has been read to me and I understand that I will be charged $3.00 for my health care visit unless it is for one of the reasons listed below in Section F. If I am charged for this visit, I agree that the $3.00 may be taken from my account.

Prisoner Signature: [redacted] Follow-up Date: 2-12-02

PRISONER: DO NOT WRITE BELOW THIS LINE

E **INSTRUCTIONS TO PRISONER** This information has been given to the doctor.

An appointment has been scheduled for you on: Date:

Signature: [illegible] Title: [illegible] Provider #: 11146 Date: 2/15/02

F **COPAYMENT** (to be filled out by health care):

Note: If none of the exceptions listed below apply, check the box below and a copay will be charged.

Care that is:

- requested by a QHP (includes transfer assessments, chronic care clinics, intake and annual screening, and required follow-up care)
- for injuries that are work-related as documented by the prisoner's work supervisor
- requested for testing for HIV, STD's, infestations, or reportable communicable diseases
- requested for evaluation, consultation, or treatment of a mental health need
- prompted by a medical emergency (see Section I of the policy, if self-inflicted)

☐ I have reviewed the visit of _____ (Date) and certify none of these exceptions apply.

Signature: Title: Provider #: Date:

Distribution: White - Health Services, Canary - Prisoner, Pink - Business Office

HEALTH CARE REQUEST

PRISONER: COMPLETE SECTIONS A THROUGH D

A NAME: Williams T

NUMBER: 173396 | LOCK: 5-A44 | DATE: 6-5-02

B This Health Care Request is for the following (check one or more):

☐ Dental ☒ Medical ☐ Mental Health

C I have the following problems/symptoms: I am experiencing a lot of pain from the Tumors in my hand, and arm. The Tumors have swollen. I cannot open my hand. with out experiencing a lot of pain. My Condition ~~is~~ has and is geting ~~worse~~ Worst. Please refer me to the Doc

D NOTICE TO PRISONER I need something for the pain ?

You will not be denied health care services for lack of personal funds. However, if your account does not have adequate funds, the copayment will be considered an institutional debt and shall be collected as set forth in PD 04.02.105, "Prisoner Funds and Prisoner Organization Accounts". Also, need renewal on "Disaleid" ?

Signing this document formally requests treatment. In addition, it authorizes the DOC to treat or arrange treatment for you and to release any necessary medical information to facilitate that treatment, to review treatment, to respond to a related grievance, or to review any appeal you may make regarding the Department's decision to charge for the care.

I have read Section D above, or it has been read to me and I understand that I will be charged $3.00 for my health care visit unless it is for one of the reasons listed below in Section F. If I am charged for this visit, I agree that the $3.00 may be taken from my account.

Prisoner Signature: Date: 6-5-02

PRISONER: DO NOT WRITE BELOW THIS LINE

E INSTRUCTIONS TO PRISONER

An appointment has been scheduled for you on: Date: 6/11/02

Signature: LEMMA Title: N Provider #: 15639 Date: 6/7/02

F COPAYMENT (to be filled out by health care):

Note: If none of the exceptions listed below apply, check the box below and a copay will be charged.

Care that is:

- requested by a QHP (includes transfer assessments, chronic care clinics, intake and annual screening, and required follow-up care)
- for injuries that are work-related as documented by the prisoner's work supervisor
- requested for testing for HIV, STD's, infestations, or reportable communicable diseases
- requested for evaluation, consultation, or treatment of a mental health need
- prompted by a medical emergency (see Section I of the policy, if self-inflicted)

☐ I have reviewed the visit of _____ (Date) and certify none of these exceptions apply.

Signature: Title: Provider #: Date:

Distribution: White - Health Services, Canary - Prisoner, Pink - Business Office

Joint Appendix Page 348

PRISONER: COMPLETE SECTIONS A THROUGH D

A NAME: Williams T

NUMBER: 173396 LOCK: B-121 DATE: 6-10-02

B This Health Care Request is for the following (check one or more):

☐ Dental ☒ Medical ☐ Mental Health

C I have the following problems/symptoms: Is There any Physical Therapy here at this facility? So, that I can get my hard to open up, and so that I can beable to Straighten my Arm back out My Condition is getting more, and more worst.

D NOTICE TO PRISONER

You will not be denied health care services for lack of personal funds. However, if your account does not have adequate funds, the copayment will be considered an institutional debt and shall be collected as set forth in PD 04.02.105, "Prisoner Funds and Prisoner Organization Accounts".

Signing this document formally requests treatment. In addition, it authorizes the DOC to treat or arrange treatment for you and to release any necessary medical information to facilitate that treatment, to review treatment, to respond to a related grievance, or to review any appeal you may make regarding the Department's decision to charge for the care.

I have read Section D above, or it has been read to me and I understand that I will be charged $3.00 for my health care visit unless it is for one of the reasons listed below in Section F. If I am charged for this visit, I agree that the $3.00 may be taken from my account.

Prisoner Signature: Follow-up Care Date: 6-10-02

PRISONER: DO NOT WRITE BELOW THIS LINE

E INSTRUCTIONS TO PRISONER

An appointment has been scheduled for you on: Date: 6/11/02

Signature: LEMMA Title: R Provider #: 15637 Date: 6/11/02

F COPAYMENT (to be filled out by health care):

Note: If none of the exceptions listed below apply, check the box below and a copay will be charged.

Care that is:

- requested by a QHP (includes transfer assessments, chronic care clinics, intake and annual screening, and required follow-up care)
- for injuries that are work-related as documented by the prisoner's work supervisor
- requested for testing for HIV, STD's, infestations, or reportable communicable diseases
- requested for evaluation, consultation, or treatment of a mental health need
- prompted by a medical emergency (see Section I of the policy, if self-inflicted)

☐ I have reviewed the visit of _____ (Date) and certify none of these exceptions apply.

Signature: Title: Provider #: Date:

Distribution: White - Health Services, Canary - Prisoner, Pink - Business Office

MICHIGAN DEPARTMENT OF CORRECTIONS
PRISONER/PAROLEE GRIEVANCE APPEAL FORM

4835-4248 12/97
CSJ-247 B

Date Received by Grievance Coordinator at Step II: 6/19

Grievance Identifier SMF 02 06 1337 12D

INSTRUCTIONS: THIS FORM IS ONLY TO BE USED TO APPEAL A STEP I GRIEVANCE.
The white copy of the Prisoner/Parolee Grievance Form CSJ-247A (or the goldenrod copy if you have not been provided with a Step I response in a timely manner) **MUST** be attached to the white copy of this form if you appeal it at both Step II and Step III.

If you should decide to appeal the Step I grievance response to Step II, your appeal should be directed to: K Peters HC by 6-26. If it is not submitted by this date, it will be considered terminated.

If you should decide to appeal the response you receive at Step II, you should send your Step III Appeal to the Director's Office, P.O. Box 30003, Lansing, Michigan, 48909.

Name (first, last)	Number	Institution	Lock Number	Date of Incident	Today's Date
Williams	173396	SMF	4-121	6/7/02	6/22/02

STEP II--Reason for Appeal The Step-2 Responde is erroneous, subjective, unresolved, and I hereby give formal 6-month prior Notice before filing imminent Civil Ac per MCL 600.2912b; MSA 27a.2912. My Grievance is that I have not been seen fo follow-up for Birth Deformity(Kasabach-Merritt Syndrome), and "Hemangioma Tum that I am currently experiencing excruciating pain for. Any prior MDOC/MAC/CM Appeals for surgery/theraphy was not forever/final. Further, Orthopedics Expe Doctor and Physical Therapist adamantly said I need surgery/theraphy. Thus, S Health Care Staff have committed Gross Negligence, Deliberate Indifference, a violated my Fed Constitutional Right to be Free from Cruel/Unusual Puni ment. Therefore, Any/All MDOC/SMF/CMS Staff responsible for not providing eit treatment/cover-up are hereby notified that litigation will be filed on them.

STEP II--Response

Date Received by Step II Respondent: JUL 2 2002

"SEE ATTACHED."

Terry Malloy, RHA — Respondent's Name (Print)

Respondent's Signature

JUL 3 2002 — Date

Date Returned to Grievant: JUL 3 2002

STEP III--Reason for Appeal The valid reason for delay in filing this Step-3 Response is due to the fact that SMF Health Care Staff & Step-2 Respondent intentionall did not send it to me until today(7/12/02). Since it/they know that on Step-3 Review instead addressing the violations it will say that the Step-3 Appeal wa not timely filed. In any event, SMF/MDOC Staff still have not complied with Michigan Statutes to respond with affidavit for a resolution before imminent litigation. Further, Dr Pramstaller has never conducted personal exam on me, a is advocate for CMS to cut costs instead of providing treatment. Please help m

NOTE: Only a copy of this appeal and the response will be returned to you.

STEP III--Director's Response is attached as a separate sheet.

If you find the Step III Director's response unsatisfactory, you have the option of referring the grievance to the Office of Legislative Corrections Ombudsman, 4th Floor, Capitol Hall, 115 W. Allegan, Lansing, Michigan, 48913.

DISTRIBUTION: White - Central Office; Green - Canary - Step III; Pink - Step II; Goldenrod--Grievant

BEST AVAILABLE COPY

Michigan Department of Corrections July 03, 2002 SMF-02-06-01337-12D

Grievance Step II Response Williams, #173396

The step I grievance, response, and reason for appeal at step II were reviewed. The patient was interviewed by RN Wright on June 17, 2002.

At step I, the patient alleged he was not receiving medical care and follow up for tumors in his fingers. Response to step I indicates on Jun3 6, 2002,. The off-site appeal was denied by the medical advisory committee. The MSP advised the patient on June 10, 2002 that surgery and physical therapy were not indicated at this time. The patient was also scheduled for an MSP follow up.

At step II, the patient alleges he is giving six months notice prior to filing a civil action for not being treated for his tumors. Investigation reveals on June 27, 2002 Dr. Goldberger evaluated the patient and is planning on consulting with Dr. Pramstaller regarding him. The patient is currently on Neurontin three times per day and Celebrex twice a day for pain management. The patient's medical concerns are being treated.

Appropriate care has been given.

TLM/mrt

MICHIGAN DEPARTMENT OF CORRECTIONS

4835-4248 12/97
CSJ-247 B

PRISONER/PAROLEE GRIEVANCE APPEAL FORM

Date Received by Grievance Coordinator at Step II: 6/19

Grievance Identifier SMF 0206 1337 12D

INSTRUCTIONS: THIS FORM IS ONLY TO BE USED TO APPEAL A STEP I GRIEVANCE. The white copy of the Prisoner/Parolee Grievance Form CSJ-247A (or the goldenrod copy if you have not been provided with a Step I response in a timely manner) MUST be attached to the white copy of this form if you appeal it at both Step II and Step III.

RECEIVED JUL 17 2002 MICHIGAN DEPT. OF CORRECTIONS PRISONER AFFAIRS

If you should decide to appeal the Step I grievance response to Step II, your appeal should be directed to: K. Peters HTC by 6-26. If it is not submitted by this date it will be considered terminated.

If you should decide to appeal the response you receive at Step II, you should send your Step III Appeal to the Director's Office, P.O. Box 30003, Lansing, Michigan, 48909.

Name (first, last)	Number	Institution	Lock Number	Date of Incident	Today's Date
Williams	173396	SMF	4-121	6/7/02	6/22/02

STEP II--Reason for Appeal The Step-2 Responde is erroneous, subjective, unresolved and I hereby give formal 6-month prior Notice before filing imminent Civil A per MCL 600.2912b; MSA 27a.2912. My Grievance is that I have not been seen f follow-up for Birth Deformity(Kasabach-Merritt Syndrome), and "Hemangioma Tu that I am currently experiencing excruciating pain for. Any prior MDOC/MAC/C Appeals for surgery/theraphy was not forever/final. Further, Orthopedics Exp Doctor and Physical Therapist adamantly said I need surgery/theraphy. Thus, Health Care Staff have committed Gross Negligence, Deliberate Indifference, violated my Fed Constitutional Right to be Free from Cuwet Cruel/Unusual Pun ment, Therefore, Any/All MDOC/SMF/CMS Staff responsible for not providing ei treatment/cover-up are hereby notified that litigation will be filed on them

STEP II--Response

Date Received by Step II Respondent: JUL 2 2002

"SEE ATTACHED."

Terry Malloy, RHA — Respondent's Name (Print)

Respondent's Signature

JUL 3 2002 — Date

Date Returned to Grievant: JUL 3 2002

STEP III--Reason for Appeal The valid reason for delay in filing this Step-3 Response is due to the fact that SMF Health Care Staff & Step-2 Respondent intentional did not send it to me until today(7/12/02). Since it/they know that on Step-3 Review instead addressing the violations it will say that the Step-3 Appeal w not timely filed. In any event, SMF/MDOC Staff still have not complied with Michigan Statutes to respond with affidavit for w resolution before imminent litigation. Further, Dr Pramstaller has never conducted personal exam on me, is advocate for CMS to cut costs instead of providing treatment. Please help

NOTE: Only a copy of this appeal and the response will be returned to you.

STEP III--Director's Response is attached as a separate sheet.

If you find the Step III Director's response unsatisfactory, you have the option of referring the grievance to the Office of Legislative Corrections Ombudsman, 4th Floor, Capitol Hall, 115 W. Allegan, Lansing, Michigan, 48913.

THIRD STEP GRIEVANCE RESPONSE

Timothy Williams, #173396
SMF-02-06-1337-12d

The Grievant presents an issue which alleges that he is not receiving medical care for his tumors in his fingers, hand and arm. The grievance was processed at the local level according to the provisions of Policy Directive 03.02.130 (Prisoner/Parolee Grievances) and Operating Procedure 03.02.130 (Prisoner/Parolee Grievances).

This investigator has reviewed the documents presented with the appeal to Step Three. **It is noted that the Step Three response is untimely for BHCS administrative reasons.** All relevant information was considered. Based on this review, this writer finds the responses provided at Step One and Step Two adequately address the merits of the main issue grieved. The medical opinions from professionals, such as doctors and nurses, will not be questioned by this office due to the technical expertise of the profession. The Step Three appeal does not demonstrate a deliberate indifference to the Grievant's medical needs. The Grievant has not shown a violation of policy. The Step Three appeal is denied.

Approval Signature: Michael A. Powell Date: SEP 11 2002
#6/9-5/12d

cc: Warden
Grievant

Plaintiff
Exhibit "I"

THIRD STEP GRIEVANCE RESPONSE

Williams # 173396
ARF 02 08 1417 28h 13133

The Grievant presents an issue which alleges more than one issue that the Grievant has submitted as one issue under ADA. He alleges that his required "reasonable accommodations" have not been met and has requested a transfer to JCF or JMF, as relief. The grievance was processed at the local level according to the provisions of Policy Directive 03.02.130 (Prisoner/Parolee Grievances) and Operating Procedure 03.02.130 (Prisoner/Parolee Grievances).

This investigator has reviewed the documents presented with the appeal to Step Three. All relevant information was considered. Based on the review, this writer finds the responses provided at Step One and Step Two adequately address the merits of the main issue grieved. The Grievant has created a vague grievance by including multiple issues, some of which do not apply to him, such as the shower chair. While his Special Accommodation Notice dated 9/5/01, does indicate a shower chair, the Step One respondent indicates that the Grievant is housed in a handicap wing which has a shower, with a chair in it. To add to the vagueness of this grievance, the Grievant has included a poor photo copy of his Special Accommodation Notice which is partially illegible. However, per PD 04.06.160 (F) "Review of the continued need for a Medical Detail or a Special Accommodation Notice shall be conducted during the annual health care screening performed pursuant to PD 03.04.100. Because the notice provided to this office exceeds one year in age, it is not known whether the special accommodations noted are still needed. The Grievant has written that, "Health Care have no jurisdiction over Americans with disabilities Act (ADA)." (Sic) This statement is refuted by PD 04.06.160 (E) and the Grievant is referred to that policy for guidance in seeking a written Special Accommodation Notice, with which he may then discuss his needs with housing staff. Due to the lack of information provided to this office, this grievance is rejected as vague and **the Step Three Appeal is denied.**

Approval Signature: _____ Date: OCT 14 2002
#8/10-11-02/28h
cc: Warden
Grievant

MICHIGAN DEPARTMENT OF CORRECTIONS
PRISONER/PAROLEE GRIEVANCE APPEAL FORM

4835-4248 12/97
CSJ-247 B

RECEIVED
SEP 27 2002
MICHIGAN DEPT. OF CORRECTIONS
PRISONER AFFAIRS

Date Received by Grievance Coordinator at Step II: 8/28/02

Grievance Identifier ARF 10 20801 4 1 7 28 H 1 9

INSTRUCTIONS: THIS FORM IS ONLY TO BE USED TO APPEAL A STEP I GRIEVANCE. The white copy of the Prisoner/Parolee Grievance, CSJ-247A (or the goldenrod copy if you have not been provided with a Step I response in a timely manner) **MUST** be attached to the white copy of this form if you appeal it at both Step II and Step III.

If you should decide to appeal the Step I grievance response to Step II, your appeal should be directed to: J. Eales by 8/30/02. If it is not submitted by this date, it will be considered terminated.

If you should decide to appeal the response you receive at Step II, you should send your Step III Appeal to the Director's Office, P.O. Box 30003, Lansing, Michigan, 48909.

Name (first, last)	Number	Institution	Lock Number	Date of Incident	Today's Date
Timothy Williams	173396	ARF	157B-3	8-13-02	8-23-02

STEP II--Reason for Appeal

See Attached:
P.D. 04.06.160. All Holders of Policy Directive Manual. "A Current Medical Detail or Special Accommodation is Notice is Valid And Must be honored At All institutions

STEP II--Response

Date Received by Step II Respondent: 8/28/02

The Step I Response is upheld. You offer no indication that you have talked with any staff in your Unit (RUM, ARUS or RUO) to have your concerns addressed. The Facility ADA Coordinator, ADW Pass, has addressed your concerns directly with you. If you have further requests that are verified by Health Care Staff, feel free to forward those requests to your RUM or ARUS. Grievance resolved.

Tom Bell — Respondent's Name (Print)
Respondent's Signature
9/11/02 — Date

Date Returned to Grievant: 9/12/02

STEP III--Reason for Appeal The Respondent's still have not Complied with michigan statutes to respond with Affidavit For Resolution before imminent litigation. Health Care have no Jurisdiction over the Americans with disabilities Act. ADA ADW ~~stated~~ Pass stated that she is not An expert and will no touch The issue. I went to the RUM, and A-Rum and They would not Act at that Time.

NOTE: Only a copy of this appeal and the response will be returned to you.

STEP III--Director's Response is attached as a separate sheet. Issue still unresolved.

If you find the Step III Director's response unsatisfactory, you have the option of referring the grievance to the Office of Legislative Corrections Ombudsman, 4th Floor, Capitol Hall, 115 W. Allegan, Lansing, Michigan, 48913.

DISTRIBUTION: White--Central Office; Green - Canary --Step III; Pink--Step II; Goldenrod--Grievant

MICHIGAN DEPARTMENT OF CORRECTIONS
PRISONER/PAROLEE GRIEVANCE FORM

4835-4247 10/94
CSJ-247A

Date Received at Step I 8/22/2002 Grievance Identifier: ARF 2002 08 1417 2811

Be brief and concise in describing your grievance issue. If you have any questions concerning the grievance procedure, refer to PD 03.02.130 and OP 03.02.130 available in the prison Law Library.

Name (print first, last)	Number	Institution	Lock Number	Date of Incident	Today's Date
WILLIAMS-EL	173396	ARF	157-8-3	08/13/02	08/20/02

What attempt did you make to resolve this issue prior to writing this grievance? On what date? 08/13/02
If none, explain why. By sending a kite to the warden's office. Unresolved!

State problem clearly. Use separate grievance form for each issue. Additional pages, using plain paper, may be used. Four copies of each page and supporting documents must be submitted with this form. The grievance must be submitted to the Grievance Coordinator in accordance with the time limits of OP 03.02.130.

RESPONDENT: Warden D. Jamrog

ISSUE: Compliance with the Americans with Disabilities Act. (ADA)(42 U.S.C. 12101 et seq) M.D.O.C. PD-03.03.130, DOM 1998-40 (now 2000-22) 8 U.S. Code of Federal Regulations (28 C.F.R. 35. 130 (8)(7) and (8). PD-04.01.100 (D) and (E). (10-May 1996; note to all Government Employees at all levels). See attached!

FACTS: The following special accommodations are not met at this facility.

I requested the following special accommodations under the law stated above. The push button sink must have the button depressed continuously for water to come out. With but one hand, I am prevented from all proper use of the sink. Access to shower chair! Secondly, I need handicapped accessible single cell with additional locker shelves for handicap access. And I need a writing surface to be able to prepare letters etc. "Reasonable Accommodations" means any change or adjustment to sink/cell, locker!

SEE ATTACHED! T Williams-El
Grievant's Signature

RESPONSE (Grievant Interviewed? ☐ Yes ☐ No If No, give explanation. If resolved, explain resolution.)
This grievance is of no merit for several reasons. One is that you have details to cover most of these issues! You have a detail for a better bunk, one for an assistance, you are on a handicapp wing which has a shower with a chair in it. It appears that you are trying to use your handicapp to get transfered to a facility of your choice. which is non-grievable as you don't have a right to specific placement, as to the facility, room/cell that you lock.

J. Eaton — 8/22/02 — Reviewer's Signature — Date
Respondent's Signature — Date
J. Eaton — CRR — Reviewer's Name (Print) — Working Title
Respondent's Name (Print) — Working Title

Date Returned to Grievant: 8/22/02
If resolved at Step I, Grievant sign here. Resolution must be described above. Grievant's Signature — Date

DISTRIBUTION: White, Green, Canary, Pink--Process to Step One; Goldenrod--Grievant

Joint Appendix Page 63

This grievance is an attachment from grievance dated 08/20/02. Williams-El, #173396. Lock 157-8r 3

Handicap assist with daily chores!

The relief that i'm requesting is that I be sent to a facility such as JCF or JMF because I know that the two facilities have these accommodations because I was housed at both of them.

Sincerely submitted

T C Williams-El

Timothy Williams-El

MICHIGAN DEPARTMENT OF CORRECTIONS
PRISONER STATIONERY

Exh. 3.7

CSJ-110 4/90
4835-3110

TO:

NAME	Warden D. Jamros	
NO. AND STREET OR R.R.		
CITY	STATE	ZIP

FROM:

NAME	T. Williams	
NO.	173396	LOCK 219-3
INSTITUTION	ARF	DATE 8-13-02

IN CORRESPONDENCE, USE NAME AND NUMBER ON YOUR LETTER AND ENVELOPE

RE: Compliance with the Americans with Disabilities Act (ADA) (42 U.S.C. 12101 et seq.) MDOC PD-03.03.130, DOM 1994-40 (now 2000-22), and [redacted] U.S. Code of Federal Regulations (28 CFR 35.130(b)(7)+(8)

Dear Sir or Madam,

I request the following special accommodations under the law stated above. This push button sink must have the button depressed continuously for water to come out. With but one hand, I am prevented from all proper use of the sink. Access to shower chair?

Second, I need handicapped accessable cell with additional shelves for handicap access. "Reasonable Accommodation" means any change or adjustment to sink & cell [redacted] Locker. Handicap Assist with duty Chore?

Sincerely,
T. Williams
T. Williams-173396
219-3

T.W.
enclosures
ADA [redacted] Coordinator
Warden D. Jamros

Joint Appendix Page 65

Exhibit

MICHIGAN DEPARTMENT OF CORRECTIONS

"Expecting Excellence Every Day"

MEMORANDUM

DATE: July 3, 2002

TO: Grievance Coordinator, M. Raines

FROM: Step I Grievance Responder **(Vaughn A. Stewart, Ass't. Business Mgr.)**

SUBJECT: Step I Grievance Response
Grievance #SMF-0206-1384-03F
RE: **(Timothy Williams, #173396, #4-121)**

The grievant was not interviewed. The grievant alleges **that on 06/13/02 he sent the case manager a kite requesting that Maintenance adjust the water in his cell.** Investigation of the grievant's issue reveals **that the cell the inmate is presently housed in is a handicap cell, and it is functioning as designed. Maintenance will make the necessary adjustments to the sink so that the water will run longer and allow the inmate the ability to maintain the appropriate hygiene.**

DR:jo

Exhibit No. [redacted]

MICHIGAN DEPARTMENT OF CORRECTIONS-Bureau of Health Care

4835-7244
CHJ-244 12 95

This form is to be completed only when medical condition or physical disability affects placement, housing, work assignment, or requires special supplies/equipment.

Necessary accommodations: If accommodations are temporary record date accommodation must be reviewed beside checkbox (HX ☐ _____ MM/DD/YY).

A. Housing:

- HA ☐ _____ Barrier Free/Wheelchair Accessible
- HB ☐ _____ Smoke Free
- HC ☒ _____ Ground Floor Room
- HD ☐ _____ Continuous Electric Power
- HE ☐ _____ Continuous Access to Toilet
- HF ☒ _____ Shower Chair
- HG ☒ _____ Bottom Bunk
- HH ☐ _____ Single-person Room
- HI ☐ _____ Sink/toilet in Room
- HJ ☐ _____ Extra Bedding/Clothing (specify) _____
- HK ☐ _____ Frequent Laundry Service
- HL ☐ _____ Geriatric Unit
- HZ ☒ _____ Other (specify) extra sheets

*needs access to water

B. Work Assignment:

- WA ☐ _____ No Work Assignment-Temporary Restriction
- WB ☒ _____ No Standing
- WC ☒ _____ No Heights
- WD ☐ _____ No Driving/Dangerous Machinery
- WE ☒ _____ No Lifting More Than 10 lbs
- WZ ☐ _____ Other (specify) _____

C. Medical Equipment/Supplies:

- MA ☐ _____ Limb Prosthesis (specify) _____
- MB ☐ _____ Brace (specify type) _____
- MC ☐ _____ Crutches
- MD ☒ _____ Cane (type) walking
- ME ☐ _____ Walker
- MF ☐ _____ Dressing/catheter/colostomy Supplies
- MG ☐ _____ Prescription Shoe (specify) _____
- MI ☐ _____ Dialysis - Peritoneal
- MJ ☐ _____ Wheelchair (type) _____
- MK ☐ _____ Contact Lens(es) & Supplies
- ML ☐ _____ Hearing Aid
- MM ☐ _____ Incontinence Garment extra large
- MN ☒ _____ Special Garment (specify) _____
- MO ☐ _____ Glasses - RX: _____
- MZ ☒ _____ Other (specify) Brim Burg

D. Other:

- OA ☒ _____ Attendant to assist with meal access and other movement inside the institution. Attendant will not feed or lift the patient, or perform elements of personal hygiene. needs assistance with mayclining
- OB ☐ _____ Therapeutic Diet (specify) _____
- OC ☐ _____ Handicap Table
- OD ☐ _____ Communication Assistance: ☐ Hearing ☐ Sight ☐ Reading/writing
- OE ☐ _____ Transport Vehicle with Lift
- OZ ☒ _____ Other (specify) Attendant to assist with cleaning cell

	Signature	Title	Number	Date
Completed By:				
Approved By:	John C Talbot DO	MSP	00013	1-25-99

SPECIAL ACCOMMODATION NOTICE

Patient Identification
Name: Williams, Timothy
Number: 173396
D.O.B.: 2-5-64

6-123

Distribution: White-Health Record, Canary-Record Office File, Pink-Counselor, Goldenrod-Prisoner

5:15-cv-12-2:22-3 (1) Exhibit "E" 11

MICHIGAN DEPARTMENT OF CORRECTIONS-Bureau of Health Care

4835-7244
CHJ-244 12/95

This form is to be completed only when medical condition or physical disability affects placement, housing, work assignment, or requires special supplies/equipment.

Necessary accommodations: If accommodations are temporary record date accommodation must be reviewed beside checkbox (HX ☐ _____ MM/DD/YY).

A. Housing:

- HA ☐ _____ Barrier Free/Wheelchair Accessible
- HB ☐ _____ Smoke Free
- HC ☒ _____ Ground Floor Room
- HD ☐ _____ Continuous Electric Power
- HE ☐ _____ Continuous Access to Toilet
- HF ☒ _____ Shower Chair
- HG ☒ _____ Bottom Bunk
- HH ☐ _____ Single-person Room
- HI ☐ _____ Sink/toilet in Room
- HJ ☒ _____ Extra Bedding/Clothing (specify) 2 extra sheets or wool blanket
- HK ☐ _____ Frequent Laundry Service
- HL ☐ _____ Geriatric Unit
- HZ ☒ _____ Other (specify) needs access to elevator

up dated for SMPF

B. Work Assignment:

- WA ☐ _____ No Work Assignment-Temporary Restriction
- WB ☐ _____ No Standing
- WC ☐ _____ No Heights
- WD ☐ _____ No Driving/Dangerous Machinery
- WE ☒ _____ No Lifting More Than 10 lbs
- WZ ☐ _____ Other (specify) _____

C. Medical Equipment/Supplies:

- MA ☐ _____ Limb Prosthesis (specify) _____
- MB ☐ _____ Brace (specify type) _____
- MC ☐ _____ Crutches
- MD ☒ _____ Cane (type) walking
- ME ☐ _____ Walker
- MF ☐ _____ Dressing/catheter/colostomy Supplies
- MG ☐ _____ Prescription Shoe (specify) _____
- MI ☐ _____ Dialysis - Peritoneal
- MJ ☐ _____ Wheelchair (type) _____
- MK ☐ _____ Contact Lens(es) & Supplies
- ML ☐ _____ Hearing Aid
- MM ☐ _____ Incontinence Garment extra large
- MN ☒ _____ Special Garment (specify) cuffs
- MO ☐ _____ Glasses - RX: _____
- MZ ☒ _____ Other (specify) Barn shoe

No continual, repetitive, bending at the waist.
No continual, repetitive grasping with right hand.

D. Other:

- OA ☒ _____ Attendant to assist with meal access and other movement inside the institution. Attendant will not feed or lift the patient, or perform elements of personal hygiene. needs assistance with tray delivery
- OB ☐ _____ Therapeutic Diet (specify) _____
- OC ☐ _____ Handicap Table
- OD ☐ _____ Communication Assistance: ☐ Hearing ☐ Sight ☐ Reading/writing
- OE ☐ _____ Transport Vehicle with Lift
- OZ ☒ _____ Other (specify) Attendant to assist with cleaning cell

	Signature	Title	Number	Date
Completed By:	K. Wright	RN II	15432	10/7/99
Approved By:	Dr. Englegood			

SPECIAL ACCOMMODATION NOTICE

Patient Identification
Name: Williams, Timothy
Number: 173396
D.O.B.:

6-123

Distribution: White-Health Record, Canary-Record Office File, Pink-Counselor, Goldenrod-Prisoner

Joint Appendix Page 638

EXH. 6.7

MICHIGAN DEPARTMENT OF CORRECTIONS-Bureau of Health Care

4835-7244
CHJ-244 12/95

This form is to be completed only when medical condition or physical disability affects placement, housing, work assignment, or requires special supplies/equipment.

Necessary accommodations: If accommodations are temporary record date accommodation must be reviewed beside checkbox (HX ☐ _____ MM/DD/YY).

A. Housing:

- HA ☐ _____ Barrier Free/Wheelchair Accessible
- HB ☐ _____ Smoke Free
- HC ☒ _____ Ground Floor Room
- HD ☐ _____ Continuous Electric Power
- HE ☐ _____ Continuous Access to Toilet
- HF ☒ _____ Shower Chair
- HG ☒ _____ Bottom Bunk
- HH ☐ _____ Single-person Room
- HI ☐ _____ Sink/toilet in Room
- HJ ☒ _____ Extra Bedding/Clothing (specify) 2 extra sheets
- HK ☐ _____ Frequent Laundry Service ok / wheelchair
- HL ☐ _____ Geriatric Unit
- HZ ☒ _____ Other (specify) extra pillow

B. Work Assignment:

- WA ☒ _____ No Work Assignment-Temporary-Restriction
- WB ☒ _____ No Standing
- WC ☒ _____ No Heights
- WD ☐ _____ No Driving/Dangerous Machinery
- WE ☒ _____ No Lifting More Than 10 lbs
- WZ ☐ _____ Other (specify) _____

C. Medical Equipment/Supplies:

- MA ☐ _____ Limb Prosthesis (specify) _____
- MB ☒ _____ Brace (specify type) right wrist
- MC ☐ _____ Crutches
- MD ☒ _____ Cane (type) walking
- ME ☐ _____ Walker
- MF ☐ _____ Dressing/catheter/colostomy Supplies
- MG ☐ _____ Prescription Shoe (specify) _____
- MI ☐ _____ Dialysis - Peritoneal
- MJ ☐ _____ Wheelchair (type) _____
- MK ☐ _____ Contact Lens(es) & Supplies
- ML ☐ _____ Hearing Aid
- MM ☐ _____ Incontinence Garment
- MN ☐ _____ Special Garment (specify) _____
- MO ☐ _____ Glasses - RX: _____
- MZ ☒ _____ Other (specify) Elbow sling

No continuous extra fluids at meals or gasping with right hand

D. Other:

- OA ☒ _____ Attendant to assist with meal access and other movement inside the institution. Attendant will not feed or lift the patient, or perform elements of personal hygiene. Needs assistance with tray delivery
- OB ☐ _____ Therapeutic Diet (specify) _____
- OC ☐ _____ Handicap Table
- OD ☐ _____ Communication Assistance: ☐ Hearing ☐ Sight ☐ Reading/writing
- OE ☐ _____ Transport Vehicle with Lift
- OZ ☒ _____ Other (specify) Warrant for main D.H. clearance cell

	Signature	Title	Number	Date
Completed By:	K Wright	RN	15137	7/15/00
Approved By:				

SPECIAL ACCOMMODATION NOTICE

Patient Identification
Name: Williams, Timothy
Number: 173396
D.O.B.: 6-1-64

Distribution: White-Health Record, Canary-Record Office File, Pink-Counselor [redacted]

Joint Appendix Page 659

NOTICE TO ALL GOVERNMENT EMPLOYEES ...AT ANY AND ALL LEVELS

The law does apply to you, specifically Title 18 united States Code (U.S.C.) - Criminal Statutes.

The U.S.C. is private copyrighted law, implemented through administrative process and is lawfully binding on all contracting parties. Each individual public employee at any level of government, is a contracting party, through acceptance, consideration, oath, and performance. Please refer to Title 18 U.S.C. Section 1001, ...trickery, false statements and covenants: in other words if you, as a contracting public employee, have knowledge of a crime and conceal it, the penalty for not reporting the crime is $10,000 U.S.D. and/or 5 years in prison. Title 18 U.S.C. section 1018 covers false statements.

Title 42 U.S.C. section 1983-86 - anyone who has knowledge of a crime or damage to a person and withholds it is as guilty as the offending party.

To tie this all together:

1. If you work for ANY governmental entity, you are bound by the law, most specifically the State statutes and the United States Code.
2. The code, regulations and administrative process are binding under your employment contract.
3. As a paid professional, you are required to know the law and its effects.
4. When your agency or its employees commit a crime, and you are knowledgeable of said crime, you are bound under your employment contract to enforce the law. Failure to do so constitutes complicity in the crime.
5. No one can be immune from a criminal act, i.e. your agency cannot condone your unlawful acts and defend or protect you. You must and will stand in your individual capacity. Immunity does not attach when one steps out from under the umbrella called the law.
6. Two or more parties working in concert to commit a crime, or deprive anyone of their Constitutionally protected rights, is a conspiracy in fact and in law, and is punishable under the RICO statutes in Title 18 U.S.C.

NOTICE = KNOWLEDGE

7. Each of you, both individually and jointly, now have knowledge of the law, and as such, shall be prosecuted for your individual acts and willful violations of the law against the People of the united states of America and the Posterity as defined in the unanimous Declaration of July 4, 1776.

We, the People, will no longer tolerate our agents and employees in government perpetrating crimes with the impression that there will be no penalties or recourse "In Law."

Notice to any representative in government constitutes notice to all. It is the responsibility of the receivers of this Notice to notify all public employees at both the Federal and State levels. Failure to notice, constitutes no protection under the law. Ignorance of the law is no excuse. Maxim of law)

Declared and Ordered this 8th day of April, 1996.

Presiding Justice,

Supreme Court for the united States of America

Joint Appendix Page 70

Exh. 6.7

MICHIGAN DEPARTMENT OF CORRECTIONS

4835-4248 12/97
CSJ-247 B

PRISONER/PAROLEE GRIEVANCE APPEAL FORM

Date Received by Grievance Coordinator at Step II: _____

Grievance Identifier [illegible]

INSTRUCTIONS: THIS FORM IS ONLY TO BE USED TO APPEAL A STEP I GRIEVANCE.
The white copy of the Prisoner/Parolee Grievance Form CSJ-247A (or the goldenrod copy if you have not been provided with a Step I response in a timely manner) **MUST** be attached to the white copy of this form if you appeal it at both Step II and Step III.

If you should decide to appeal the Step I grievance response to Step II, your appeal should be directed to: _____ _____ by _____. If it is not submitted by this date, it will be considered terminated.

If you should decide to appeal the response you receive at Step II, you should send your Step III Appeal to the Director's Office, P.O. Box 30003, Lansing, Michigan, 48909.

Name (first, last)	Number	Institution	Lock Number	Date of Incident	Today's Date
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

STEP II--Reason for Appeal

See Attached.

STEP II--Response

Date Received by Step II Respondent:

Respondent's Name (Print) | Respondent's Signature | Date

Date Returned to Grievant:

STEP III--Reason for Appeal

NOTE: Only a copy of this appeal and the response will be returned to you.

STEP III--Director's Response is attached as a separate sheet.

If you find the Step III Director's response unsatisfactory, you have the option of referring the grievance to the Office of Legislative Corrections Ombudsman, 4th Floor, Capitol Hall, 115 W. Allegan, Lansing, Michigan, 48913.

DISTRIBUTION: White--Central Office; Green - Canary --Step III; Pink--Step II; Goldenrod--Grievant

EX 4

The step 2 response is erroneous, subjective, unresolved, and I hereby give formal 6-month prior notice before filing imminent Civil Action per MCL 600.2912(b) MSA 27.(e) 2912.

My grievance is that I am entitle, and is in need of full accommodation, under the Americans with disabilities Act (ADA). Yes, I have been partly accommodated. I have accommodations and also other disable needs. See Special Accommodations Notice attached. I have a birth deformity (Kasabach-Merritt Syndrome) and "Hemangioma Tumors" which I am currently experiencing excruciating pain as a result of being denied special accommodations which only add to the pain.

Proper placement under M.D.O.C. PD-05.01.140 "Prisoners Placement and Transfer." Yes, I do request that if I can't be accommodated here at ARF.

Mr. Williams-El is handicapped and therefore need to be housed in a barrier-free facility to meet his unique personal hygiene need; A sink with a turning knob to wash after bowel-movement etc.

The only accommodations that has been met is bottom bunk, and handicap shower!

ARF instituted a system by which prisoners cold address ADA concerns by filing a grievance which wold be forwarded to ADA Coordinator.

The grievance coordinator is hindering prisoners' due process by not conveying complaints to the ADA Coordinator.

The grievance system at ARF, however, has completely failed in addressing Mr. Williams' ADA and related issues.

The grievance coordinator have failed to address grievant's complaints in this regards: he can not make a judgement in this area because he's not qualified; rather, the ADA Coordinator is.

Discrimination, according to the U.S. Department of Justice regulations, is not an option: "A public entity "SHALL NOT" impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered. "28 CFR 35.130(b)8)".

ADMINISTRATIVE REQUIREMENTS:

The responsibilities of the Warden, Deputy Warden, and Deputy of Housing regulatory references: 28 CFR 35.105-35.107; 35.150(c) and (d).
II-8.1000 GENERAL. Title II requires that public entities take several steps designed to achieve compliance. These include the preparation of self-evaluation. In addition, public entities with 50 or more employees are requires to:
(1) DEVELOP A GRIEVANCE PROCEDURE; (2) DESIGNATE AN INDIVIDUAL TO OVERSEE TITLE II COMPLIANCE; (3) DEVELOP A TRANSITION PLAN IF STRUCTURAL CHANCES ARE NECESSARY FOR ACHIEVING PROGRAM ACCESSIBILITY; and (4) RETAIN THE

EX 5

SELF-EVALUATION FOR THREE YEARS.

Mr. Williams-El need to be evaluated to address his housing needs. Mr. Williams-El is a qualified individual with a disability.

Police Directive 03.02.130 states under the heading STEP 1 GRIEVANCE COORDINATOR AT ¶R The Grievance Coordinator may respond at Step 1 to grievances which can be responded to with minimal investigation or rejected for reasons authorized by this policy. However, if the Grievance Coordinator responds to the merits of the grievance, a grievance interview must be conducted as required in ¶AA.

STEP 2 ¶EE The Grievance Coordinator shall assign an appropriate respondent and indicate the date by which the response is due. The respondents for Step 2 grievances shall be as follows: §1. The Warden in CFA facilities and SAI, except that s/he may delegate this responsibility to the appropriate Deputy Warden if more that one institution is supervised. IF the Warden supervises a camp, s/he may delegate this responsibility for camp grievances to the Assistant Deputy Warden at the camp.

§1. A public entity must examine each program to determine whether any physical barriers to access exist. It should identify steps that need to be taken to enable these programs to be made accessible when viewed in their entirety. IF structural changes are necessary, they should be included in the transition plan. (see ADA II-8.3000 TRANSITION PLAN) under Title II Technical Assistance Manual 1994 Supplement; heading II-8.2000 SELF-evaluation §1.

Submitted by,

Timothy Williams-El

Timothy Williams-El, #173396

Plaintiff's Exhibit J

EPARTMENT OF CORRECTIONS
PAROLEE GRIEVANCE FORM

4835-4247 10/94
CSJ-247A

Received at Step I 9/11/2002 Grievance Identifier: ARF 2002 09 1509 28H

Be brief and concise in describing your grievance issue. If you have any questions concerning the grievance procedure, refer to PD 03.02.130 and OP 03.02.130 available in the prison Law Library.

Name (print first, last)	Number	Institution	Lock Number	Date of Incident	Today's Date
Timothy L. Williams-el	173396	ARF	V57B-3	9-9-02	9-9-02

What attempt did you make to resolve this issue prior to writing this grievance? On what date? 9-9-02
If none, explain why. I was called out by pass. it was unresolved!

State problem clearly. Use separate grievance form for each issue. Additional pages, using plain paper, may be used. Four copies of each page and supporting documents must be submitted with this form. The grievance must be submitted to the Grievance Coordinator in accordance with the time limits of OP 03.02.130.

Respondent's: A.D.W. Pass of [redacted] programs

Issue: Compliance with the Americans with Disabilities Act (42 U.S.C. 12101 et seq.)

Governing: II-I. 4000 Rehabilitation Act, Relationship to other laws:

Facts

On 9/4/02. I sent [redacted] A.D.W. Pass My request For Special Accommodation in response to Passes Memo. however, it was denied in part and I was not satisfied with MS. Pass Interview. [redacted] A.D.W. T. Williams-el
Grievant's Signature
Pass denied me the Full Equal benefits under The A.D.A. Cont.

RESPONSE (Grievant Interviewed? ☐ Yes ☐ No If No, give explanation. If resolved, explain resolution.)
This grievance is of no merit as your medical detail states that you are to have a bottom bunk.
Your grievance is being returned to you without processing for the reason that it is without merit.
It doesn't state that you are to be in a handicapp room or cell. Also your grievance is unclea as to what other programs you are being excluded from, or that you have to participate in that you are not able to do. Your detail from health care covers what you are allowed or restricted from doing.

J Eatonq — Respondent's Signature — 9/11/02 Date — Reviewer's Signature — Date
J Eatonq — Respondent's Name (Print) — CRR Working Title — Reviewer's Name (Print) — Working Title

Date Returned to Grievant: 9/11/02
If resolved at Step I, Grievant sign here. Resolution must be described above. Grievant's Signature — Date

DISTRIBUTION: White, Green, Canary, Pink--Process to Step One; Goldenrod--Grievant

Title II may not be interpreted to provide a lesser degree of protection to individuals with a disabilities than is provided under the law.

The A.D.A. strictly prohibits discrimination based on disability "Subject to the provisions of This ~~@~~ subchapter, No qualified individual with a disability shall, by reason of such disability be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity" 42 USC sec. 12132.

What Ms. Pass is saying is that "You are handicap, but I am only going to grant handicap Accessible needs as she see Fit, not as to what I am entitle to under the (ADA), "Deliberately INDIFFrent."

Qualified individual with disability' (1) Individuals who have a physical or mental impairment that substantially limits one or more major life activities; (2) Individuals who have a record of a physical mental impairment that substantially limited one or more of the individual's major life activities; and (3) Individuals who are regarded as having ~~had~~ such an impairment, Whether they have the impairment or not. to Simply say that I am not entitle to all benefits is discriminating

People commonly refer to disabilities or disabling conditions in a broad sense. For example, poverty or lack of education may impose real

limitations on an individual's opportunities.
Note:
I strongly feel that [redacted] A.D.W. Pass is acting out of retaliation due to a current civil action that I filed against her and other correctional officials at Jackson Cnl.

Ms. Pass stated "that she is not an expert -in A.D.A. And that I should go to health [redacted] care, [redacted] Health Care Nurses is not an expert either... However, Policy Directive 05.01.140, directs Mr. Pass refers to an "Onsite Health care Services Grid" to Assist in. Placing Prisoners with disabilities in Appropriate Facilities. Also see PD-03.01.140 at (E) Due to the ~~vigi~~ unique needs of Prisoner who....use wheelchairs" or" have other disabilities.

A Prisoner should make A request For reasonable Accommodations to the ~~Red~~ Resident unit ~~manage~~ Manager (RUM) of the Dept A.D.A. Coordinator, P.O. Box. 30003, Lansing, MI 48909, instead A.D.W. direct me to H/C.

This Grievance is written on A.D.W. Pass For Failure to Act, and retaliation and/or handicap Discrimination.

P.S. Let this grievance serve as a Preclude to Forthcoming civil Action!

T. Williams
T. Williams
173396

T.W.
CC: File

Exh. 6.

MICHIGAN DEPARTMENT OF CORRECTIONS
PRISONER/PAROLEE GRIEVANCE APPEAL FORM

4835-4248 12/97
CSJ-247 B

Date Received by Grievance Coordinator at Step II: 9/18/02 [illegible] Grievance Identifier ARF0209010509Z8H

INSTRUCTIONS: THIS FORM IS ONLY TO BE USED TO APPEAL A STEP I GRIEVANCE. The white copy of the Prisoner/Parolee Grievance Form CSJ-247A (or the goldenrod copy if you have not been provided with a Step I response in a timely manner) **MUST** be attached to the white copy of this form if you appeal it at both Step II and Step III.

If you should decide to appeal the Step I grievance response to Step II, your appeal should be directed to: J. Tator by 9/23/02. If it is not submitted by this date, it will be considered terminated.

If you should decide to appeal the response you receive at Step II, you should send your Step III Appeal to the Director's Office, P.O. Box 30003, Lansing, Michigan, 48909.

Name (first, last)	Number	Institution	Lock Number	Date of Incident	Today's Date
Timothy Williams	173396	ARF	15TB3	9-7-02	9-17-02

STEP II--Reason for Appeal The Step-1 Response is erroneous, Misleading/deceitful, Subjective, and Unresolved. I here by Give Formal 6-Month Prior Notice before Filing immi ent Civil Action Per-MCL 600.2912(b). 2Ta.291

See Attached:

STEP II--Response
The Step I Response is upheld. You offer no verifiable information or witness to support your claims. You offer no idication of any discriminatory acts. Your required accommodations have been met by this facility. Grievance denied.

Date Received by Step II Respondent: 9-18-02

Tom Bell — Respondent's Name (Print)
[signature] — Respondent's Signature
9/27/02 — Date

Date Returned to Grievant: 10/3/02

STEP III--Reason for Appeal ARF/MDOC Staff have not Complied with Michigan Statutes to respond With affidavit For Re solution Before imminent Litigation. Further, It is not about What Accommodation I require. it is What I need, E that I am A Qualified individual with a disability which ~~not~~ makes me entitle to All benefits. Without ~~the~~ Single ~~Handicap~~

NOTE: Only a copy of this appeal and the response will be returned to you. Call I suffer more Pa

STEP III--Director's Response is attached as a separate sheet. At risk of More Tumors Developi

If you find the Step III Director's response unsatisfactory, you have the option of referring the grievance to the Office of Legislative Corrections Ombudsman, 4th Floor, Capitol Hall, 115 W. Allegan, Lansing, Michigan, 48913.

Continue On Pg-2 Str A-2

DISTRIBUTION White--Central Office; Green - Canary --Step III, Pink--Step II, Goldenrod--Grievant

BEST AVAILABLE COPY

ARF-2002-09-1509-28-H

Step 2. Pg. 2 of 1 Williams-173396

The Grievant is dissatisfied with the respondent's response At step one (1). The Grievance Coordinator responded to the merits of the Grievance, PD-03.02.130 (R). Therefore, A Grievance interview must be conducted as required in Paragraph (AA).

I am Clear as to what I need, A "handicap Single cell." In any event, H/C has no Jurisdiction over the Americans with disabilities Act. (ADA). Only the RUM or A-Rum. (See Prisoner Guidebook, by Director Williams Overton, At Pg. 26).

Which states, A Prisoner should Make a request For a reasonable ACCommodation to the Resident Unit Manager (RUM) or Dept. of (ADA) Coordinator P.O. Box 30003, Lansing, MI 48909.

AFter consistently requesting For A Single handicap cell, On 9-9-02, A-Rum Risley signed me to one, (Accessable handicap Cell).

On 9-10-02, (RUO) Markwell, intentionally interfered with (A-Rum) Risley's Authority by going up to Mr. klee, Deputy warden of housing, both, Markwell, And klee Conspired together, And Moved me out OF the handicap Accessable Cell back to non-Handicap Cell, On 9-10-02.

ARF-2002-09-1509-28-H
Step-2- Pg. 3-of 2 Williams-173396

Since I transfered into this Facility (ARF) I have complained to (RUM) Williams, (A-RUM) Risley, (ADW) Pass, And The (Warden) D. Jamros From 8-11-02 [redacted]-9-9-02, And Health Care Supervisor Ms. Petterson.

All I received was the run Arounds, discrimination etc. All respondent's were, and still Are deliberately indiFFrent to Mr. Williams (ADA) needs.

I have also enclosed, The necessary law, Policy etc. in suport of My request/ complaint, See Attached Exhibit ("A").

There is A Conflict of interest to (ADW) Mary-Jo [redacted] Passes, Obligations to my (ADA) needs, due to a civil matter Shes been included in. (See civil case in Part attached to this Step (2).)

That is WHY (ADW) Mary-Jo Pass Refused to Act on my (ADA) issues. As a result of being denied handicap cell only Adds to the Pain I am exPrienc-ing From The Tumors in my Fingers, hAnd, Arm, and right-Arm bicep. See Medical records Attached (exhibit A, & B)

T. W.
CC: File

T. Williams
T. Williams-173396
Lack-157 B-3
ARF

Step 3, pg. 2 of 1-ARF-0209-01609-28-H
Williams-173396 date 10-5-02.

Prisoner williams-173396 will suffer IRReparable Injury/Harm if his special ACCOmmodations are ~~a~~ not meet

1) Continued pain and its myriad of effects, From loss of sleep, Mental, emotional and Other psychological injury/harm;

2) Permanent damages From my room-mate running iNto my hand/Arm, Pain and Suffering From not being able to relax my hand/~~arm~~ arm in a Comfortable position to ~~help~~ help ease some pain in my Fingers & arm & ~~bi~~ b.icep.

3) Pain and Suffering From my room-mate Const-antly running into my Arm, Cell is not ~~a~~ b.ig-enough.

4). The Combination of the above, and the other items not listed, render the decision of (ARF) the MDOC to be grossly Violative of the Constitution, (ADA), and Rehabilitation Act, and equal protection of the law. "Requested", A Single handicap cell is ~~need~~ needed to ~~be~~ better my quality of living Conditions of Confinement.

Joint Appendix Page 81

Ex 4.b.

THIRD STEP GRIEVANCE RESPONSE

Williams # 173396
ARF 02 09 1509 28h changed TO 28A

The Grievant presents an issue which makes a vague allegation regarding ADW Pass denying a request for special accommodation. The grievance was processed at the local level according to the provisions of Policy Directive 03.02.130 (Prisoner/Parolee Grievances) and Operating Procedure 03.02.130 (Prisoner/Parolee Grievances).

This investigator has reviewed the documents presented with the appeal to Step Three. All relevant information was considered. The grievant was not specific as to the acts of ADW Pass which he believes offended the grievant in some way. In his Step Two appeal, the grievant included actions by Officer Markwell, again complaining about the Grievant's removal from a handicap cell. In the Step Three appeal, the Grievant violated PD 03.02.130 by writing in the margins of the appeal form, making part of his grievance illegible. This grievance is rejected as vague, illegible and for being a duplicate grievance to ARF 02 09 1507 28c. **The Step Three Appeal is denied.**

This grievance is considered frivolous for being a duplicate issue to two other grievances and not providing any information to support the allegations made. The Grievant has acted without a good faith effort to resolve an issue, but writes in his Step One grievance, "let this grievance serve as a preclude to forthcoming civil action" (sic).

Michael A. Powell

NOV 07 2002

Approval Signature: _____ Date: _____
#8/11-6-02/28h to 28a
cc: Warden
Grievant

13/53

(Plaintiff Exhibit "J")

PRISONER CORRESPONDENCE

Date: August 30, 2002

From: M.J. Pass, ADW of Programs

157B3

To: Williams, T., #173396, ~~219-B-3~~

Subject: ADA Request

A review of your medical file indicates a current special accommodation notice. I spoke with ARUS Bechler about this accommodation. You should receive those things as listed through his office. Further, a work order has been submitted to have maintenance extend the length of time the faucets run when pushed.

If you have any questions or concerns, feel free to "kite" me.

MJP/jr

cc: ADA file

Exhibit "J"

To: M. J. Pass A.D.W OF Programs

(Plaintiff 1
Exhibit "11"
page 1 of 2

From: T. Williams-173396
157 B-3

Subject: Memo. response

September 4, 2002

Dear Sir or Madam,

I Just received your response dated August 30, 2002. however, I have submitted my A.D.A requests on A standard Form to make proper record. Also you stated that if I have any questions or conceins, Feel Free to kite you. I would like to say that From my INFO. There will be A handicapped Single Cell open on 9-6-02, cell-131-3 ! I hope we can resolve This A.D.A. issue, because my handicap is no ~~faster~~ Laster Then the other handicappers.

Sincerely,
T. William
T. Williams-173396
157 B-3

T.W.
CC: File

Plaintiff's Exh. "B" + Pg. 2 of 1 J-F "J"

MICHIGAN DEPARTMENT OF CORRECTIONS
PRISONER ACCOMMODATION REQUEST

4835-0707
CAJ-707 12/94

Please type or print and return to Accommodation Coordinator. Information contained on this form is classified as Confidential to the extent permitted by law. Please complete form and note that this accommodation request cannot be processed unless the accommodation request has sufficient information on your needs, to determine if accommodation can be made.

1. Name: Timothy Williams
2. Location: A. R. F.
3. Facility / Community Center: Adrian
4. Lock#: 157 B-3
5. Name of RUM Prison Counselor or PPO: Warden, and A.D.W. of Programs

6. Describe what programs, services or activities you are requesting to participate in:

A.D.A., A public entity must offer separate or special accommodation when necessary to provide individuals with disabilities an equal opportunity to "Benefit" from all programs. Designed to meet the needs of the individual with disabilities, but are not limited to.

7. Describe in your own words the limitations caused by your condition for which you are requesting accommodation(s). Use additional pages if necessary.

I cannot rest my arm without additional space to write letters etc. Additional shelves in needed. I suffer from Hemangiomus Tumors due to birth deformity.

8. Describe any accommodations you believe would be of benefit in order to participate in services, programs or activities.

Handicap single cell, with additional locked shelves; a accessibility writing surface to rest my arm while writing; legal work etc. My arm have painful tumors, and hand. Handicap assistant to assist in cell cleaning. All sinks need adjustments to run longer.

9. Date Submitted: 9-4-02
10. Prisoner Signature: Timothy L. Williams
11. Facility / Office Location: Warden

Distribution: White - Warden/Regional Administrator; Canary - EEO Office; Pink - Prisoner

T.W.
Encl.
Warden,
A.D.W. OF Prog...
A.R.F

Plaintiff Exhibit

MICHIGAN DEPARTMENT OF CORRECTIONS

"Expecting Excellence Every Day"

MEMORANDUM

DATE: September 9, 2002

TO: Williams # 173396 157 - B -3

FROM: Mary-Jo Pass, ADW

SUBJECT: ADA Request

This is response to your ADA request. As discussed at our 9-9-02 meeting you should contact health services if you believe that you require more accommodations then you are currently receiving. If they concur with your request notification will be made to the ARUS. At that time if I need to intercede I will. Your request for an assistant has been approved by Health Services and will be adhered to .. Further, a work order will be completed to length the sink time in the bathroom on your wing only.

With regard to the form you submitted these were drafts which were never approved according to Central Office.

Should you require any further information feel free to contact this office.

cc: B. Peterson, HUM
M. Harpst
file

Exhibit "K"

MICHIGAN DEPARTMENT OF CORRECTIONS
PRISONER/PAROLEE GRIEVANCE FORM

4835-4247 10/94
CSJ-247A

Date Received at Step I: 9/11/2002 Grievance Identifier: ARF 2002 09 1507 28C

Be brief and concise in describing your grievance issue. If you have any questions concerning the grievance procedure, refer to PD 03.02.130 and OP 03.02.130 available in the prison Law Library.

Name (print first, last)	Number	Institution	Lock Number	Date of Incident	Today's Date
Timothy Williams-el	173396	ARF	131 B-3	9-10-02	9-10-02

What attempt did you make to resolve this issue prior to writing this grievance? On what date? 9-10-02
If none, explain why. By trying to resolve with officer involved. Unresolved.

State problem clearly. Use separate grievance form for each issue. Additional pages, using plain paper, may be used. Four copies of each page and supporting documents must be submitted with this form. The grievance must be submitted to the Grievance Coordinator in accordance with the time limits of OP 03.02.130.

On 9-10-02, officer A/O. Markwell stoped me ~~at the~~ when I came back from the Chow-Hall around 7:56 Am He stated to me" how in the Fuck you get A handicap assistant, And A handicap cell." I respond And Asked the officer not to swear at me. Mr. Markwell then stated "Fuck you, I do not give a Fuck, Theres nothing wrong with you!" "You Are Capable of assistant your on Fuck-self" I Then walked Away. However, when I came back and showed him my medical detail And Accommodations he again swear at me. I then realized There was no use in trying to talk to officer Markwell. However, I then went to school. Around 9:10. Am I was Call Out

T. Williams-el
Grievant's Signature

or next page-a-

RESPONSE (Grievant Interviewed? ☐ Yes ☐ No If No, give explanation. If resolved, explain resolution.)
This grievance contains several issues one being that you were moved from a handicapp room to a bottom bunk, which is of no merit as your health care detail reads bottom bunk, nothing about a handicapp room/cell. You medical rights were not violated as the housing unit gets a copy of your medical detail/s. The last issue is the statements made to you by the staff member.

Your grievance is being returned to you without processing for the reason that you are in violation of PD-03.02.130. This procedure states that you must limit your grievance to one (1) issue per grievance. You have included more than one (1) issue as prescribed in this procedure. Grievance denied at first step.

J Eaton
Respondent's Signature
J Eaton
Respondent's Name (Print)

9/11/02
Date
CRR
Working Title

Reviewer's Signature
Date
Reviewer's Name (Print)
Working Title

Date Returned to Grievant: 9/11/02

If resolved at Step I, Grievant sign here.
Resolution must be described above.
Grievant's Signature
Date

DISTRIBUTION: White, Green, Canary, Pink--Process to Step One; Goldenrod--Grievant

Out by OFFicer Markwell. When I returned to the unit he told me to move back to 157B-3 non-handicap cell.

Note: A-Run Mr. Risley signed me to a handicapped cell on 9-9-02.

I discoved that OFFicer Markwell ~~went~~ had went to health care to seek information about my medical condition ~~off~~ out of my medical file while I was in School. Apparently, someone in health care told him or gave him info. I later learned that OFFicer Markwell left health care and went up to Deputy Killee, and Mr. Killee ordered ~~to~~ me to move out OF the handicap cell, and back to the Non-handicap cell.

Note: R.U.O Markwell did not only violate my A.D.A right, but he also violated my confidentiality medical rights by going to look or Ask about my medical condition.

R.U.O. Markwells duty is to only Follow the law, A.D.A law. Not to Abuse his Authority, And retaliate ~~against~~ Against For simply trying to get special ACCOMmodated, For something I am entile to.

In Any event, R.U.O. Markwell used profanity At me. humiliated me in Front of All Prisoners. He retaliated against me, and abused his Authority by going to Deputy Killee OF housing to have me moved ~~out~~ of handicap cell. P.S. Let this Grievance Serve as a Preclude to Forthcoming Civil Action

T. Williams
T. Williams

Exhibit

MICHIGAN DEPARTMENT OF CORRECTIONS
4835-4248 12/97
CSJ-247B

PRISONER/PAROLEE GRIEVANCE APPEAL FORM

Date Received by Grievance Coordinator at Step II: 9/16/02 JLC

Grievance Identifier: ARF-10-2-C-910-15-0728-C 8

INSTRUCTIONS: THIS FORM IS ONLY TO BE USED TO APPEAL A STEP I GRIEVANCE. The white copy of the Prisoner/Parolee Grievance Form CSJ-247A (or the goldenrod copy if you have not been provided with a Step I response in a timely manner) **MUST** be attached to the white copy of this form if you appeal it at both Step II and Step III.

If you should decide to appeal the Step I grievance response to Step II, your appeal should be directed to: J. Cater by 9/19/02. If it is not submitted by this date, it will be considered terminated.

If you should decide to appeal the response you receive at Step II, you should send your Step III Appeal to the Director's Office, P.O. Box 30003, Lansing, Michigan, 48909.

Name (first, last)	Number	Institution	Lock Number	Date of Incident	Today's Date
Timothy Williams	173396	ARF	157B-3	9-10-02	9-14-02

STEP II--Reason for Appeal The Step-2-Responde is erroneous, Subjective, Unresolved. And I hereby [redacted] give Formal 6-Month Prior Notice before Filing imminent Civil Action Per MCL 600.2912(b) [redacted]. MSA 27a.2912. My grievance is that, RUO Markwell used Profanity at me, Humiliated me in Front of everyone, And interfered with medical Treatment, Special Accommodations Violating My right. Continue

STEP II--Response

The Step I Response is upheld. Your appeal to this level continues to cite multiple issues. RUO Markwell denies using the language you quote. You have no ADA Accommodation which requires a handicapped cell. There has been no violation of the confidentiality of your medical file. You offer no verifiable information or witness to support any of your claims. Grievance denied.

Date Received by Step II Respondent: 9-16-02

Tom Bell — Respondent's Name (Print)
Tom Bell — Respondent's Signature
9/27/02 — Date

Date Returned to Grievant: 10/3/02

STEP III--Reason for Appeal ARF/MDOC Staff have not Complied with Michigan Statutes to respond with Affidavit For Resolution before imminent litigation. With all due Respect to Mr. T. Bell. This response is Ludicrous, IF NOT outright ~~ob~~ Unfounded, Under the Facts in this Complaint. See Attached Medical Records etc.

NOTE: Only a copy of this appeal and the response will be returned to you.

STEP III--Director's Response is attached as a separate sheet.

If you find the Step III Director's response unsatisfactory, you have the option of referring the grievance to the Office of Legislative Corrections Ombudsman, 4th Floor, Capitol Hall, 115 W. Allegan, Lansing, Michigan, 48913.

DISTRIBUTION: White--Central Office Green - Canary--Step III, Pink--Step II, Goldenrod--Grievant

Pg. [redacted] LKF-02-09-1509-28-R

Step-2 Grievance

First. Grievance Coordinator once again responded to the merits ~~in~~ of the's grievance. Therefore, A interview must be Conducted.

Second. The step II response is only another delaying tactic; to cover-up staff corruption. And harassment simply because I Am Complaining of Wrongdoing.

Then. The respondant states that. My grievance contains severl issues. well. it does not. I [redacted] mention the handicap cell which lad-up to the officer (RUO Markwell) conduct And/or Personal behavior. See PD-[redacted] 02.03.100. Attachment A First Rule Violation, No. 1, 2, 5, 13, 35.

RUO Markwell. had no jurisdiction to Interfere with Any (ADA) issues, Specially. When (A-RUM) Risley ~~#~~ Signed me to A handicap cell For handicap ACcommodations Purposese! Per- Prisoner Guidebook. At (Pg. 26). The Resident Unit Manager (RUM) or (ADA) Coordinator in Lansing has jurisdiction in the (ADA) Area. In this (Rum) Apparently. The ADA responsibility was delegated to A-Rum Risley.

RUO's shall be Assigned specife Areas of responsibility For Purposes of housing And sanitation, see PD-04.03.102 At Pg. 6,(Z)

173396

T. Williams

T. Williams

Joint Appendix Page 91

EXH. 5.2

AIDS AND HEPATITIS B PREVENTION PROGRAM

Source: Policy Directive 03.04.120

Blood-borne diseases such as AIDS and Hepatitis B continue to present a serious health threat. Blood-borne/sexually transmitted diseases such as AIDS and Hepatitis B are not transmitted by casual contact, but may be transmitted through contact with blood or other bodily fluids. Whenever bodily fluids are present, universal precautions must be taken.

As stated in Policy Directive 03.04.120, prisoners are tested for communicable blood-borne diseases. The Policy Directive also provides direction regarding those who refuse to cooperate with testing and those who have positive tests. For additional information regarding this matter, see Policy Directive 03.04.120.

Also, for more information, contact the medical staff at your facility or the AIDS Coordinator, Michigan Department of Corrections, Bureau of Health Care Services, P.O. Box 30003, Lansing, Michigan 48909.

MENTAL HEALTH SERVICES

Sources: Policy Directive 04.06.180
Policy Directive 04.06.183
Policy Directive 05.01.120

Mental health services are available to prisoners. Those services are available in settings ranging from hospital care to counseling services. Prisoners who believe they need mental health services should contact health care services at their facility through the facility's "kite" system.

The above Policy Directives provide additional information about mental health services.

PRISONERS WITH DISABILITIES

Qualified Prisoners with disabilities will not be discriminated against. Prisoners with disabilities are provided reasonable accommodations so they can participate in programs, services and activities. Prisoners will be evaluated for disabilities when they are processed in the reception center. Information regarding a prisoner's disability is treated as confidential.

A prisoner should make a request for a reasonable accommodation to the Resident Unit Manager (RUM) or the Department ADA Coordinator, P.O. Box 30003, Lansing, MI 48909.

Joint Appendix Page 92

EN.1.07

MICHIGAN DEPARTMENT OF CORRECTIONS
PRISONER/PAROLEE GRIEVANCE APPEAL FORM

4835-4248 12/97
CSJ-247 B

Date Received by Grievance Coordinator at Step II: 9/16/02 JC

Grievance Identifier ARF102109101507284

INSTRUCTIONS: THIS FORM IS ONLY TO BE USED TO APPEAL A STEP I GRIEVANCE.
The white copy of the Prisoner/Parolee Grievance Form CSJ-247A (or the goldenrod copy if you have not been provided with a Step I response in a timely manner) **MUST** be attached to the white copy of this form if you appeal at both Step II and Step III.

RECEIVED
OCT 16 2002
MICHIGAN DEPT. OF CORRECTIONS
PRISONER AFFAIRS

If you should decide to appeal the Step I grievance response to Step II, your appeal should be directed to: J. Caton by 9/19/02. If it is not submitted by this date, it will be considered untimely.

If you should decide to appeal the response you receive at Step II, you should send your Step III Appeal to the Director's Office, P.O. Box 30003, Lansing, Michigan, 48909.

Name (first, last)	Number	Institution	Lock Number	Date of Incident	Today's Date
Timothy Williams	173396	ARF	157B-3	9-10-02	9-14-02

STEP II--Reason for Appeal The Step-2- Responde is erroneous, Subjective, Unresolved. And I hereby [redacted] Give Formal 6-Month Prior Notice before Filing imminent Civil Action Per MCL 600.2912(b) [redacted]. MSA 27a. 2912. My grievance is that, RUO Markwell used Profanity at me, Humiliated me in Front of everyone And interfered with medical Treatment Special Accomodations Violating My right. Continue

STEP II--Response

The Step I Response is upheld. Your appeal to this level continues to cite multiple issues. RUO Markwell denies using the language you quote. You have no ADA Accommodation which requires a handicapped cell. There has been no violation of the confidentiality of your medical file. You offer no verifiable information or witness to support any of your claims. Grievance denied.

Date Received by Step II Respondent: 9-16-02

Tom Bell
Respondent's Name (Print)

Tom Bell
Respondent's Signature

9/27/02
Date

Date Returned to Grievant: 10/3/02

STEP III--Reason for Appeal ARF/MDOC Staff- have not Complied with Michigan Statutes to respond with Affidavit For Resolution before imminent litigation. With all due respect to Mr. T. Bell. This response is Ludicrous, IF NOT outright confounded, Under the Facts in this Compliant. See Attached Medical Records etc.

NOTE: Only a copy of this appeal and the response will be returned to you.

STEP III--Director's Response is attached as a separate sheet.

If you find the Step III Director's response unsatisfactory, you have the option of referring the grievance to the Office of Legislative Corrections Ombudsman, 4th Floor, Capitol Hall, 115 W. Allegan, Lansing, Michigan, 48913.

DISTRIBUTION: White--Central Office; Green - Canary --Step III; Pink--Step II; Goldenrod--Grievant

Exhibit

131-B

THIRD STEP GRIEVANCE RESPONSE

Williams # 173396
ARF 02 09 1507 28c

The Grievant presents an issue which alleges harassment by RUO Markwell because he called Health Care to establish a need for the handicap cell, into which the Grievant had been placed. The Grievant also alleges that the officer used profanity toward the grievant and interfered with the Grievant's medical treatment by having him moved to a bottom bunk in a non-handicap cell. The Grievant believes that these actions violate the Americans with Disabilities Act (ADA). The grievance was processed at the local level according to the provisions of Policy Directive 03.02.130 (Prisoner/Parolee Grievances) and Operating Procedure 03.02.130 (Prisoner/Parolee Grievances).

This investigator has reviewed the documents presented with the appeal to Step Three. All relevant information was considered. Based on the review, this writer finds the responses provided at Step One and Step Two adequately address the merits of the main issue grieved. The Grievant has failed to provide sufficient information to substantiate his allegations through witnesses or other verifiable information. No medical records or Special Accommodation Notice was provided to illustrate that the grievant should have been placed in a handicap cell, for medical reasons, as he indicated. No proof of any special or reasonable accommodations has been provided to this office. Therefore, no violation of policy has been demonstrated and no further action is warranted. Because the information provided to this office does not support the Grievant's allegations, **the Step Three Appeal is denied.**

The Grievant has not demonstrated a good faith effort in attempting to resolve an issue, but only makes reference to his use of the grievance process as a means to litigate. With no medical documentation to verify the claims made in this grievance, this grievance is considered frivolous.

Approval Signature: Michael A. Powell Date: NOV 07 2002
#8/11-6-02/28c
cc: Warden
Grievant

Exhibit "L"

MICHIGAN DEPARTMENT OF CORRECTIONS
PRISONER/PAROLEE GRIEVANCE FORM

4835-4247 10/94
CSJ-247A

Date Received at Step I 9/11/2002 Grievance Identifier: ARF 2002 09 1508 28H

Be brief and concise in describing your grievance issue. If you have any questions concerning the grievance procedure, refer to PD 03.02.130 and OP 03.02.130 available in the prison Law Library.

Name (print first, last)	Number	Institution	Lock Number	Date of Incident	Today's Date
Timothy Williams	173396	ARF	157B3	9-10-02	9-10-02

What attempt did you make to resolve this issue prior to writing this grievance? On what date? 9-10-02
If none, explain why. I went to Case Manager Risley, it was not resolved.

State problem clearly. Use separate grievance form for each issue. Additional pages, using plain paper, may be used. Four copies of each page and supporting documents must be submitted with this form. The grievance must be submitted to the Grievance Coordinator in accordance with the time limits of OP 03.02.130.

Respondent: Deputy Warden of Housing; ~~Kllee~~ P. Klee

ISSUE: Conspire to commit Conspiracy in a Criminal Act:

FACTS:

This Grievance is being writen on Deputy Warden ~~Kllee~~ P. Klee For his part in a conspiracy Act Criminal Act. Deputy ~~Kllee~~ P. Klee conspired with R.U.M. Markwell to remove me from a handicap cell, after Case manager Risley had signed me to a handicap cell on 9-9-02. Deputy Wardens has no Authority When dealing with Prisoner disabilities. ~~Only A-Rooms & Room, ADA Coordinator in training~~ (See Prisoner Guidebook by D.C. William

T. Williams
Grievant's Signature

RESPONSE (Grievant Interviewed? ☐ Yes ☐ No If No, give explanation. If resolved, explain resolution.) overto P.2.6

This grievance is of no merit as your helath care detail only states in part that you have

Your grievance is being returned to you without processing for the reason that it is without merit.

a bottom bunk and not a handicapp cell/room. Per your detail you are in a bottom bunk and provided the other provisions listed on your detail. You also failed to talk to or kite ADW Klee before writing the grievance.

Respondent's Signature	Date	Reviewer's Signature	Date
J Eaton	9/11/02		
Respondent's Name (Print)	Working Title	Reviewer's Name (Print)	Working Title
	CRR		

Date Returned to Grievant: 9/11/02	If resolved at Step I, Grievant sign here. Resolution must be described above.	Grievant's Signature	Date

DISTRIBUTION: White, Green, Canary, Pink--Process to Step One; Goldenrod--Grievant

Exhibit

MICHIGAN DEPARTMENT OF CORRECTIONS
PRISONER/PAROLEE GRIEVANCE APPEAL FORM

4835-4248 12/97
CSJ-247 B

Date Received by Grievance Coordinator at Step II: 9/16/02 JLL

Grievance Identifier: ARF 02 09 0015 C 5128 H

INSTRUCTIONS: THIS FORM IS ONLY TO BE USED TO APPEAL A STEP I GRIEVANCE. The white copy of the Prisoner/Parolee Grievance Form CSJ-247A (or the goldenrod copy if you have not been provided with a Step I response in a timely manner) **MUST** be attached to the white copy of this form if you appeal it at both Step II and Step III.

If you should decide to appeal the Step I grievance response to Step II, your appeal should be directed to: J. Estes by 9/19/02. If it is not submitted by this date, it will be considered terminated.

If you should decide to appeal the response you receive at Step II, you should send your Step III Appeal to the Director's Office, P.O. Box 30003, Lansing, Michigan, 48909.

Name (first, last)	Number	Institution	Lock Number	Date of Incident	Today's Date
Timothy Williams	173396	ARF	157B-3	9-10-02	9- -02

STEP II--Reason for Appeal The Step-2 Responde is erroneous, Subjective, Unresolved, and I hereby Give Formal 6-Month Notice before Filing imminent Civil Action Per MCL ~~6000~~ 600.2912B: MSA 27a.2912. My Grievance is that Deputy Warden of housing Conspire to Commit Conspiracy in a Criminal Act. with C/O and/or R.U.O. Markwell to remove me From A handicap cell After A-Lvm Risky moved in me in one to Accommodate me. -1-

STEP II--Response

The Step I Response is upheld. You have no ADA Accommodation which requires you to be housed in a handicapped cell. You offer no verifiable information or witness to support your claims. There does not appear to be any violation of any Policy, Procedure, Rule, or law in this matter. Grievance denied.

Date Received by Step II Respondent: 9-16-02

Tom Bell — Respondent's Name (Print)
Tom Bell — Respondent's Signature
9/27/02 — Date

Date Returned to Grievant: 10/3/02

STEP III--Reason for Appeal ARF/MDOC. Staff have not Complie with Michigan Statutes to respond with Affidavit for Resolution before imminent Litigation. Tom Bell has, and had the Authority remedy the Conspiracy Act of MCKlee by ordering Klee and (R.U.O) Markwell: Place me back in the Single handicap cell. Refused to do so!

NOTE: Only a copy of this appeal and the response will be returned to you.

STEP III--Director's Response is attached as a separate sheet.

If you find the Step III Director's response unsatisfactory, you have the option of referring the grievance to the Office of Legislative Corrections Ombudsman, 4th Floor, Capitol Hall, 115 W. Allegan, Lansing, Michigan, 48913.

DISTRIBUTION: White--Central Office, Green - Canary--Step III, Pink--Step II, Goldenrod--Grievant

Pg. 2 OF 1 9-13-02

Williams-#-173396, ARF-29-1508-28H

Deputy ~~warden~~ of Housing klee, Acted out of his Job responsibility. According to the law, And Polity. Mr. klee had ~~no~~ no, jurisdiction over the A.D.A. to decide Who will be ~~no~~ Accommodated.

Also, According to Michigan Dept. of Corr. Prisoner Guidebook Director of M.D.O.C. William Overton, implomented At Pg(26) He Stated.

" A Prisoner should make a request For a reasonable Accommodation to the Resident Unit Manager (RUM) OR the department ADA Coordinator, P.O. Box 30003, Lansing, MI 48909. Not H/C!

I Also enclosed herewith the Necessary law, Polity, and Authority in Suport of Conspiracy, And A.D.A. Claim.

With a man of Deputy klee position he should know or should have known that he had no jurisdiction to Act on such a Area of law!

T.W.

Cc: File

T. Williams

T. Williams

#173396

Exh. 3.7

THIRD STEP GRIEVANCE RESPONSE

Williams # 173396
ARF 02 09 1508 28h changed to 28a

The Grievant presents an issue which alleges a criminal conspiracy with the ADW of housing acting with Officer Markwell to deprive the Grievant of a handicap cell. The grievance was processed at the local level according to the provisions of Policy Directive 03.02.130 (Prisoner/Parolee Grievances) and Operating Procedure 03.02.130 (Prisoner/Parolee Grievances).

This investigator has reviewed the documents presented with the appeal to Step Three. All relevant information was considered. This issue is determined to be a duplicate issue to ARF 02 09 1507 28c, and is rejected as a duplicate grievance. **The Step Three Appeal is denied**.

This grievance is considered frivolous and the grievant has acted without a good faith effort to resolve his issue, by indicating that this purpose in filing the grievance is to litigate, regardless of any response received.

Approval Signature Michael A. Powell Date NOV 07 2002
#8/11-6-02/28h to 28a
cc: Warden
Grievant

Plaintiff's Exhibit M

MICHIGAN DEPARTMENT OF CORRECTIONS
PRISONER/PAROLEE GRIEVANCE FORM

4835-4247 10/94
CSJ-247A

Date Received at Step I 10/1/2002 Grievance Identifier: ARF 2002 10 1646 1211

Be brief and concise in describing your grievance issue. If you have any questions concerning the grievance procedure, refer to PD 03.02.130 and OP 03.02.130 available in the prison Law Library.

Name (print first, last)	Number	Institution	Lock Number	Date of Incident	Today's Date
Timothy Williams-el	173396	ARF	157B-3	9-20-02	9-25-02

What attempt did you make to resolve this issue prior to writing this grievance? On what date? 9-18-02
If none, explain why. Corresponding, And receiving response from Nurse supervisor B. Petterson. Unresolved.

State problem clearly. Use separate grievance form for each issue. Additional pages, using plain paper, may be used. Four copies of each page and supporting documents must be submitted with this form. The grievance must be submitted to the Grievance Coordinator in accordance with the time limits of OP 03.02.130.

Respondent: Supervisor, B. Petterson

Issue: Special Accommodations, (ADA) (42 U.S.C. 12101 et seq.)

Governing: PD-04.06.160,(E), PD-05.01.140 (MM) PD-03.03.130 (H) (k-3, 4, and 5).

Facts: Around or On 9-18-02, I once again requested ACCommodations that day; during examination with Dr. Mustafa. I explained to the Doctor the Pain that I was experiencing without additional space. T. Williams-el
Grievant's Signature
Dr. Mustafa M.D. said he will get back After Continue Pg. -2-

RESPONSE (Grievant Interviewed? ☒ Yes ☐ No If No, give explanation. If resolved, explain resolution.)

Per P.D. 04.06.160 E. Health Services has provided the necessary accomodations to provide reasonable options to meet grievants special medical needs.

Linda Anderson 10/11/02 Dana-Jean Biro 10-11-02
Respondent's Signature Date Reviewer's Signature Date
Linda Anderson RN III DANA-JEAN BIRO MRESII
Respondent's Name (Print) Working Title Reviewer's Name (Print) Working Title

Date Returned to Grievant: 10/14/02 If resolved at Step I, Grievant sign here. Resolution must be described above. Grievant's Signature Date

DISTRIBUTION: White, Green, Canary, Pink--Process to Step One; Goldenrod--Grievant

Joint Appendix Page 101

Pg. 2 OF 1
Williams-173386 9/24/02

He talke with R.N. Supervisor B. Petterson. On 9-19-02, I sent kite to Ms. Petterson And she responded denying request For handicap Single Cell, Stating that, "The handicap cell are to accommodate wheel-Chair. (See Attached kite)

R.N. Pettersons, respond is only Another delay, or deny tactic; nothing is being done to accommodate my painful handicap condition.

I have explained ~~and~~ over and over again why I need Single handicap cell. (see EXhibit "B" Attached). The kite response is designed to give the impression that,

PD-05.01.140 only accommodate Single cell, if you are in a wheelchair. At (M M) it States, Due to the unique needs of prisoner who... use wheelchair "or" have other disabilities. R.N. Supervisor B. Petterson have ~~acted~~ constructed, And instituted her own policy. (See policy, PD-04.06.160. (E), EXhibit "C" Attached), And other governing Authority Attached "EXhibit "D").

PD-03.03.130, (k) (1, 2, 3, 4,) prohibition Corporal punishment. I am experiencing alot of distress, degradation, And humiliation.

Continue →

And
~~A~~ Pain. My Condition is very, very, Serious. (see Medical information Exhibit E-1- 8 pgs Attached). With a light touch it causes Alot of Pain!

Simply stating that handicap-cells Are only For wheelchair only will not satisfy the Federal Statute.

T. W.
CC:

T. Williams
T. Williams-173396
157 B-3

#173396 Exh. 6.2

MICHIGAN DEPARTMENT OF CORRECTIONS-Bureau of Health Care 4835-7549 CHJ-5499/00

HEALTH CARE REQUEST

PRISONER: COMPLETE SECTIONS A THROUGH D

A NAME: Williams

NUMBER: 173396 | LOCK: 15TB-3 | DATE: 9-19-02

B This Health Care Request is for the following (check one or more): ☐ Health Record Copies ☐ Dental ☐ Medication Refill ☒ Medical ☐ Optometry ☐ Mental Health ☐ Non-urgent ☒ Urgent

C I have the following problems/symptoms: I was over in H/C seeing the Doctor on some (ADA) issues. One being, A Pair of "Velcro Shoes" Sizes 11½, Athletic, & State Black ~~or~~ Shoes. due to I only have one useable hand. Also, what is the progress on me being accomadicated with a handicap accessable cell, Single? DOC. said he needs to talk with you Ms. Petterson, concerning the ~~a~~ Single Cell matter.

D NOTICE TO PRISONER

You will not be denied health care services for lack of personal funds. However, if your account does not have adequate funds, the copayment will be considered an institutional debt and shall be collected as set forth in PD 04.02.105, "Prisoner Funds and Prisoner Organization Accounts".

L. Williams

Signing this document formally requests treatment. In addition, it authorizes the DOC to treat or arrange treatment for you and to release any necessary medical information to facilitate that treatment, to review treatment, to respond to a related grievance, or to review any appeal you may make regarding the Department's decision to charge for the care.

I have read Section D above, or it has been read to me and I understand that I will be charged $3.00 for my health care visit unless it is for one of the reasons listed below in Section F. If I am charged for this visit, I agree that the $3.00 may be taken from my account.

Prisoner Signature: Follow-up care Date: 9-19-02

PRISONER: DO NOT WRITE BELOW THIS LINE

E INSTRUCTIONS TO PRISONER

Mr. Williams The Velcro St. tie Shoes have been ordered. No Order from MD for athletic shoes. Why would you need a single cell or accessories. Your last one ck. & did Fine with a Point That's matter. The single Cell

RECEIVED SEP MEDICAL RECORDS PRISON CENTER

An appointment has been scheduled for you on: to accommodate Wheelchair

Signature: Title: Provider #: Date:

F COPAYMENT (to be filled out by health care):

Note: If none of the exceptions listed below apply, check the box below and a copay will be charged.

Care that is:
- requested by a QHP (includes transfer assessments, chronic care clinics, intake and annual screening, and required follow-up care)
- for injuries that are work-related as documented by the prisoner's work supervisor
- requested for testing for HIV, STD's, infestations, or reportable communicable diseases
- requested for evaluation, consultation, or treatment of a mental health need
- prompted by a medical emergency (see Section I of the policy, if self-inflicted)

☐ I have reviewed the visit of _____ (Date) and certify none of these exceptions apply.

Signature: Title: Provider #: Date:

Distribution: White - Health Services, Canary - Prisoner, Pink - Business Office

Exh. 6.9

MICHIGAN DEPARTMENT OF COR TIONS
PRISONER/PAROLEE GRIEVANCE APPEAL FORM

4835-4248 12/97
CSJ-247 B

Date Received by Grievance Coordinator at Step II: 10/22/02

Grievance Identifier ARF 021 901 64 12 I 1

INSTRUCTIONS: THIS FORM IS ONLY TO BE USED TO APPEAL A STEP I GRIEVANCE. The white copy of the Prisoner/Parolee Grievance Form CSJ-247A (or the goldenrod copy if you have not been provided with a Step I response in a timely manner) **MUST** be attached to the white copy of this form if you appeal it at both Step II and Step III.

If you should decide to appeal the Step I grievance response to Step II, your appeal should be directed to: J. Eaton by 10/23/02. If it is not submitted by this date, it will be considered terminated.

If you should decide to appeal the response you receive at Step II, you should send your Step III Appeal to the Director's Office, P.O. Box 30003, Lansing, Michigan, 48909.

Name (first, last)	Number	Institution	Lock Number	Date of Incident	Today's Date
Timothy Williams-el	173346	ARF	A1578	9-20-02	10-19-02

STEP II--Reason for Appeal

SEE ATTACHMENT - EXHIBIT "1"

STEP II--Response

Date Received by Step II Respondent: 10-22-02

See Attachment

Jan Egg RHA — Respondent's Name (Print)

Respondent's Signature

11-4-02 — Date

Date Returned to Grievant: 11/4/02

STEP III--Reason for Appeal

NOTE: Only a copy of this appeal and the response will be returned to you.

STEP III--Director's Response is attached as a separate sheet.

If you find the Step III Director's response unsatisfactory, you have the option of referring the grievance to the Office of Legislative Corrections Ombudsman, 4th Floor, Capitol Hall, 115 W. Allegan, Lansing, Michigan, 48913.

DISTRIBUTION: White--Central Office; Green - Canary --Step III; Pink--Step II; Goldenrod--Grievant

EXHIBIT "1"

Grievant is contesting the step one response by claiming that Ms. Pettersen was evasive to questions presenting by the grievant. Not only that, her response was frivelous concerning the facts of law. On grievant behalf, the law is clearly established supporting his contention.

First, as a matter of law, the situation can be resolved by acknowledging the following facts:

(1) Grievant is legally handicap.
(2) A single handicap cell will improve Grievant living condition by providing adequate mobility to the grievant.
(3) Under the A.D.A. statute grievant qualify for disability.

As stated under A.D.A Title II, 3.4000, sets criteria's for separate/integration setting. It states as following, "a primary goal of the A.D.A. is the equal participation of individuals with disabilities in the "mainstream" of American Society. There are factors which that come into play dealing with disability person. One being, individuals with disabilities must be integrated to the maximum extent appropriate. The second being, individuals with disabilities cannot be excluded from the regular program, or required to accept special services or benefits. The actions of A.R.F Health Department goes against A.D.A. procedures governing handicap person.

The U.S. Supreme Court has consistently upheld that in regards to prisoner if he/she is handicap they shall be entitled to the full equal protection clause. Specially, the Court has stated that, prisoner do not surrender their rights to equal protection. A.R.F. Health Service Facility Manager by not providing grievant with the proper accommodation by placing him in a single cell. Proves that this individual actions are discriminatory. Grievant further believes due to his handicap which makes him disability person entitling him to the full protection of law violates the Federal Constitution. The A.D.A statutes states, ..."the prison authorities must take the prisoner medical condition and provide him/she with compatible accommodations in compliance to his physical condition".

A handicap cell will equip the grievant with necessary accommodation which will cure and ease any future hardship. Grievant condition is an ongoing medical problem. See Medical Records For Reference Which Is Illustrated In Step One Grievance. In response to step one response their application of policy is erroneous and subjects grievant to improper medical treatment. At this time, I hereby give this Department a formal notice of Six Month before filing an imminent Civil Action under MCLA 600.2912b; MSA 27a.2912.

This grievance is against Health Facility Manager Bonnie Petterson who has violated my equal protection rights. Grievant authority derives from U.S. Constitution Amendment Eight and American Disability Act of 1990, Sect. 3, 202, 42 U.S.C.A. §12102, §12132; and Title II of Rehabilitation Act, Sec. 504 (1973). In conclusion, she substantiate her position by stating and quoting PD 04.06.160 (E), "H/C has provided the necessary accommodations to provide reasonable options to meet grievants special medical needs". The option is not reasonable! This same policy states, "whenever a prisoner is identified as having a medical condition which restricts his/her ability to function adequately in the institutional environment, a qualified health professional shall identify reasonable option available in a corrections setting which will meet the

prisoner's special medical need". As you can see Ms. Pettersen did not take this portion of the policy into consideration when applying grievant facts to the situation. This policy supports the contention that if a prisoner is handicap it has within it authority to make the appropriate accommodation for a handicap prisoner. Grievant meets the requirement for placement in a single cell due to his medical condition.

T. Williams-el

Ex. 6.7

MICHIGAN DEPARTMENT OF CORRECTIONS

"Expecting Excellence Every Day"

MEMORANDUM

DATE: 11/4/02

TO: - Timothy Williams #173396

FROM: Jan Epp, BSN, RN, Regional Health Administrator
Region III

SUBJECT: **Step II Grievance Response**
Grievance # ARF 02 10 01646 1211

I have reviewed your Step I Grievance Response and your Step II Reason for Appeal. You were interviewed by Linda Anderson, RN, Nursing Supervisor, on 10/11/02.

Step I you allege that you requested a special accommodation from Dr. Mustafa, however, you never received it.

The Step I Response indicates that per PD 04.06.160E Health Services has provided the necessary accommodations to provide reasonable options to meet your special medical needs.

At Step II you allege that you are legally disabled. You also are requesting a single handicap cell, which will improve your mobility. You assume that you qualify for this room due to your A.D.A. status.

Investigation reveals that you have a diagnosis of hemangiomus tumors of the right hand and wrist. You have a special accommodation for a wrist brace. There is no documentation in your health record that indicates that you are disabled, therefore, there is no violation of the American Disability Act. You were evaluated by the Medical Service Provider and it was determined that you do not meet the criteria for a single room in accordance with the MDOC guidelines.

Exhibit 7

MICHIGAN DEPARTMENT OF CORRECTIONS
PRISONER/PAROLEE GRIEVANCE APPEAL FORM

4835-4248 12/97
CSJ-247 B

Date Received by Grievance Coordinator at Step II: 10/22/02

Grievance Identifier ARF021901646I2I

INSTRUCTIONS: THIS FORM IS ONLY TO BE USED TO APPEAL A STEP I GRIEVANCE. The white copy of the Prisoner/Parolee Grievance Form CSJ-247A (or the goldenrod copy if you have not been provided with a Step I response in a timely manner) MUST be attached to this form if you appeal it at both Step II and Step III.

If you should decide to appeal the Step I grievance response to Step II, your appeal should be directed to: J. Eaton by 10/23/02. If it is not submitted by this date, it will be considered terminated.

Received OCT 24 2002 Region III Health Services

If you should decide to appeal the response you receive at Step II, you should send your Step III Appeal to the Director's Office, P.O. Box 30003, Lansing, Michigan, 48909.

Name (first, last)	Number	Institution	Lock Number	Date of Incident	Today's Date
Timothy Williamson	173346	ARF	B157E-3	9-20-02	10-17-02

STEP II--Reason for Appeal

SEE ATTACHMENT-EXHIBIT "1"

STEP II--Response

Date Received by Step II Respondent: 10-22-02

See Attachment

Jan Epp RHA
Respondent's Name (Print)

Respondent's Signature

11-4-02
Date

Date Returned to Grievant: 11/14/02

STEP III--Reason for Appeal

SEE ATTACHED "EXHIBIT 2"

NOTE: Only a copy of this appeal and the response will be returned to you.

STEP III--Director's Response is attached as a separate sheet.

If you find the Step III Director's response unsatisfactory, you have the option of referring the grievance to the Office of Legislative Corrections Ombudsman, 4th Floor, Capitol Hall, 115 W. Allegan, Lansing, Michigan, 48913.

DISTRIBUTION White--Central Office, Green - Canary --Step III, Pink--Step II, Goldenrod--Grievant

Step-3

EXHIBIT "2"

Grievant believes Ms. Epp (Regional Health Administrator) failed to review his medical files thoroughly. Her position that I have been provided the necessary accommodations which meets my medical needs is outrageous. If were afforded special accommodations are you saying the wrist brace constitutes special accommodations? If so, I would like to bring to your attention I was never provided a wrist brace. I was examined and measure by D.L.W. therapist to see if it would fit. At this time, I do not posses a wrist brace. Once you have reviewed my medical files you will find out that none was ever provided.

Now, on the aspect that I don't fall within the realm of being legally disabled is contrary to my medical condition. In your response you acknowledged that I have a medical condition of hemangiomus tumors on my right hand and wrist. Knowing the symptoms the Medical Service Provider is aware that my condition place limitation on my mobility. Please take notice I am unable to do the things an ordinary person can do. Therefore, I shall be afforded a single handicap cell. This Health Service for some strange reason keeps contending I don't qualify because the Medical Service Provider (A.R.F.) does not believe my condition qualify as such accommodation. What I would like to bring to your attention that prior to transferring here I was provided a single handicap cell at Stanis Correctional Facility. A grievance was written against that facility and after a consulting Dr. J. Hoffman (S.M.F.) made some adjustment to the handicap cell by adjusting the cell sink to meet my medical needs. See attached "Memorandum" dated 7-3-02, clarifying that I was once confined to single handicap cell. At this time, I am requesting that I be review again by a Medical Service Provider with a complete review of my medical files.

T. Williams

T. Williams, #172396 (157-E-3)

MICHIGAN DEPARTMENT OF CORRECTIONS

"Expecting Excellence Every Day"

MEMORANDUM

DATE: July 3, 2002

TO: Grievance Coordinator, M. Raines

FROM: Step I Grievance Responder **(Vaughn A. Stewart, Ass't. Business Mgr.)**

SUBJECT: Step I Grievance Response
Grievance #SMF-0206-1384-03F
RE: **(Timothy Williams, #173396, #4-121)**

The grievant was not interviewed. The grievant alleges **that on 06/13/02 he sent the case manager a kite requesting that Maintenance adjust the water in his cell.** Investigation of the grievant's issue reveals **that the cell the inmate is presently housed in is a handicap cell, and it is functioning as designed. Maintenance will make the necessary adjustments to the sink so that the water will run longer and allow the inmate the ability to maintain the appropriate hygiene.**

DR:jo

MICHIGAN DEPARTMENT OF CORRECTIONS
PRISONER/PAROLEE GRIEVANCE FORM

4835-4247 10/94
CSJ-247A

Date Received at Step I _____ Grievance Identifier: |_|_|_|_|_|_|_|_|_|_|_|_|_|_|

Be brief and concise in describing your grievance issue. If you have any questions concerning the grievance procedure, refer to PD 03.02.130 and OP 03.02.130 available in the prison Law Library.

Name (print first, last)	Number	Institution	Lock Number	Date of Incident	Today's Date
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

What attempt did you make to resolve this issue prior to writing this grievance? On what date? [illegible]
If none, explain why. [illegible]

State problem clearly. Use separate grievance form for each issue. Additional pages, using plain paper, may be used. Four copies of each page and supporting documents must be submitted with this form. The grievance must be submitted to the Grievance Coordinator in accordance with the time limits of OP 03.02.130.

[illegible] (Continued) on Time I was placed in Detention Upper Slot Retention for an Assault [illegible] Victim (An Inmate) About 1½ Months Ago (A white Prisoner) Grass 223745, Received The Same Assault [illegible] Victim But He Was Not Given Detention Slot Out Only 30 Days (60) At The Most. This Is Clearly A Just Issue, Unfair & Unjust Would be [illegible] Should (Like) [illegible] [illegible]

Grievant's Signature

RESPONSE (Grievant Interviewed? ☐ Yes ☐ No If No, give explanation. If resolved, explain resolution.)

Respondent's Signature	Date	Reviewer's Signature	Date
Respondent's Name (Print)	Working Title	Reviewer's Name (Print)	Working Title

Date Returned to Grievant:	If resolved at Step I, Grievant sign here. Resolution must be described above. Grievant's Signature	Date

DISTRIBUTION: White, Green, Canary, Pink--Process to Step One; Goldenrod--Grievant

#43

MICHIGAN DEPARTMENT OF CORRECTIONS
PRISONER/PAROLEE GRIEVANCE FORM

4835-4247 10/94
CSJ-247A

Date Received at Step I 4-10-02 Grievance Identifier: LMF 0404 1615 1969

Be brief and concise in describing your grievance issue. If you have any questions concerning the grievance procedure, refer to PD 03.02.130 and OP 03.02.130 available in the prison Law Library.

Name (print first, last)	Number	Institution	Lock Number	Date of Incident	Today's Date
John WALTON	173849	LMF	C 135	3/24/02	4/6/02

What attempt did you make to resolve this issue prior to writing this grievance? On what date? 3/24/02
If none, explain why. I'VE KITE BOBO ON 3/24/02 AND WAITED FOR A REPLY NONE WAS SENT

State problem clearly. Use separate grievance form for each issue. Additional pages, using plain paper, may be used. Four copies of each page and supporting documents must be submitted with this form. The grievance must be submitted to the Grievance Coordinator in accordance with the time limits of OP 03.02.130.

THIS IS A RACIST DISCRIMINATION ON ADW BOBO AND THIS FACILITY (CONCERNING RETRICTIONS) ON 7/17/02 I WAS PLACED ON INDEFINITE UPPER SLOT RETRICTION FOR SAID 008 ASSAULT & BATTERY STAFF VICTIM, (AM A BLACK MAN) ABOUT 1½ MONTHS AGO (A WHITE PRISONER) GROSS 223745, RECIEVED THE SAME 008 ASSAULT & BATTERY STAFF VICTIM BUT HE WAS NOT GIVEN INDEFINITE UPPER SLOT BUT ONLY (30) DAYS (60) AT THE MOST. THIS IS CLEARLY A RACIST ISSUE; UNFAIR & UNJUST WOULD BE AN UNDERSTATEMEN THIS CLEARY SHOWS (LMF) FACILITY TO BE A RACIST AND PREJUICE PRISON FACILITY; THIS ON ADW BOBO & THIS RACIST FACILITY

Grievant's Signature John Walton

RESPONSE (Grievant Interviewed? ☒ Yes ☐ No If No, give explanation. If resolved, explain resolution.)
You were placed on an indefinate upperslot restriction on 7/17/01 by deputy Warden Gearin for assaulting staff. This is in accordance with PD 04.05.120 Segregation Standards. Restrictions are dealt with an an individual basis. One restriction does not influence another prisoner's restriction. There is no racial discrimination.

Note: Prisoner became Insolent during the interview and an (026) Insolence ticket written.

D. Girta — Respondent's Signature — 4/24/02 Date
D. Girth — Respondent's Name (Print)
CM — Working Title

C. Bauman — Reviewer's Signature — Date
C. Bauman — Reviewer's Name (Print)
RUM — Working Title

Date Returned to Grievant: 5-1-02

If resolved at Step I, Grievant sign here. Resolution must be described above. Grievant's Signature — Date

DISTRIBUTION: White, Green, Canary, Pink—Process to Step One; Goldenrod—Grievant

P-21

MICHIGAN DEPARTMENT OF CORRECTIONS

PRISONER/PAROLEE GRIEVANCE APPEAL FORM

4835-4248 12/97
CSJ-247 B

Date Received by Grievance Coordinator at Step II: _____

Grievance Identifier LMF02041616ST06a

INSTRUCTIONS: THIS FORM IS ONLY TO BE USED TO APPEAL A STEP I GRIEVANCE. The white copy of the Prisoner/Parolee Grievance Form CSJ-247A (or the goldenrod copy if you have not been provided with a Step I response in a timely manner) **MUST** be attached to the white copy of this form if you appeal it at both Step II and Step III.

If you should decide to appeal the Step I grievance response to Step II, your appeal should be directed to: 300 Bldg by 5-9-02. If it is not submitted by this date, it will be considered terminated.

If you should decide to appeal the response you receive at Step II, you should send your Step III Appeal to the Director's Office, P.O. Box 30003, Lansing, Michigan, 48909.

Name (first, last)	Number	Institution	Lock Number	Date of Incident	Today's Date
John WALTON	173849	LMF	C135	3/24/02	5/4/02

STEP II--Reason for Appeal WHEN A "WHITE PRISONER IS GIVEN A LESSER SANCATIO THAN A "BLACK" PRISONER FOR THE SAME 008 CHARGE IT IS CLEAR RACIAL DISCRIMINATION. OF A CORRUPT ADMINISTRATION(S) HEADS WARDEN ETC AN INDEFINITE RESTRICTION IS ARBITRARY WITHIN ITSELF AND IT IS USE AS AN PUNITIVE SANCATION. IF PD 04.05.120 IS IN ACCORDANCE TO KEEP ME A BLACK MAN ON UPPER SLOT WHY WASN'T IT IN ACCORDANCE TO KEEP THE WHITE MAN ON UPPER SLOT? AS A PREJUDICE AND RACIST FACIL YOU ALLOWED YOUR OWN RACE OF PRISONER NOT TO REMAIN ON UPPER SLOT

STEP II--Response

Date Received by Step II Respondent: 5/7/02

Respondent's Name (Print) _____ Respondent's Signature _____ Date _____

Date Returned to Grievant:

STEP III--Reason for Appeal

NOTE: Only a copy of this appeal and the response will be returned to you.

STEP III--Director's Response is attached as a separate sheet.

If you find the Step III Director's response unsatisfactory, you have the option of referring the grievance to the Office of Legislative Corrections Ombudsman, 4th Floor, Capitol Hall, 115 W. Allegan, Lansing, Michigan, 48913.

DISTRIBUTION: White--Central Office; Green - Canary -- Step III; Pink--Step II; Goldenrod--Grievant

BEST AVAILABLE COPY

MICHIGAN DEPARTMENT OF CORRECTIONS
PRISONER/PAROLEE GRIEVANCE APPEAL FORM

4835-4248 12/97
CSJ-247 B

Date Received by Grievance Coordinator at Step II: 5/10/02

Grievance Identifier: LMF02041615106a

MAY 17 2002

INSTRUCTIONS: THIS FORM IS ONLY TO BE USED TO APPEAL A STEP I GRIEVANCE. The white copy of the Prisoner/Parolee Grievance Form CSJ-247A (or the goldenrod copy if you have not been provided with a Step I response in a timely manner) **MUST** be attached to the white copy of this form if you appeal it at both Step II and Step III.

If you should decide to appeal the Step I grievance response to Step II, your appeal should be directed to: 300 Bldg by 5-9-02. If it is not submitted by this date, it will be considered terminated.

If you should decide to appeal the response you receive at Step II, you should send your Step III Appeal to the Director's Office, P.O. Box 30003, Lansing, Michigan, 48909.

Name (first, last)	Number	Institution	Lock Number	Date of Incident	Today's Date
John Walton	173849	LMF	C-135	3/24/02	5/4/02

STEP II--Reason for Appeal WHEN A "WHITE" PRISONER IS GIVEN A LESSER SANCATI THAN A "BLACK" PRISONER FOR THE SAME 008 CHARGE IT IS CLEAR RACIAL DISCRIMINATION OF A CORRUPT ADMINISTRATION(S) HEADS WARDEN ETC AN INDEFINITE RESTRICTION IS ARBITRARY WITHIN ITSELF, AND IT IS USE AS AN PUNITIVE SANCATION. IF PD 04.05.120 IS IN ACCORDANCE TO KEE ME" A BLACK MAN ON UPPER SLOT WHY WASN'T IT IN ACCORDANCE TO KEEP THE WHITE MAN ON UPPER SLOT? AS A PREJUDICE AND RACIST FACIL YOU ALLOWED YOUR OWN RACE OF PRISONER NOT TO REMAIN ON UPPER SLOT

STEP II--Response

Date Received by Step II Respondent: 5/7/02

A review of your Step I grievance and Step II appeal has been completed. Prisoner has not shown new evidence of discrimination to continue to the Step II level. The response at the Step I level adequately addresses prisoner's claims. Appeal denied. (CB:jlf)

Acting Warden Bergh
Respondent's Name (Print)

Respondent's Signature

5/10/02
Date

Date Returned to Grievant: 5/13/02

STEP III--Reason for Appeal THE FACT OF THE MATTER IS NOT (1) BUT (2) WHITE PRISONERS, WITH THE SAME 008 MISCONDUCTS WAS GIVEN A LESSER TIME TO BE ON THERE RESTRICTION THAN ME A BLACK PRISONER, THAT ALONE IS RACIAL DISCRIMINATION - BOTH WHITE PRISONER ARE OFF THERE RESTRICTION O UPPER SLOT GROSS #223745 & SARAH # 270314 LOOK AT THE FILES THIS IS CLEAR DISCRIMINATION

NOTE: Only a copy of this appeal and the response will be returned to you.

STEP III--Director's Response is attached as a separate sheet.

If you find the Step III Director's response unsatisfactory, you have the option of referring the grievance to the Office of Legislative Corrections Ombudsman, 4th Floor, Capitol Hall, 115 W. Allegan, Lansing, Michigan, 48913.

DISTRIBUTION: White--Central Office; Green - Canary --Step III; Pink--Step II; Goldenrod--Grievant

THIRD STEP GRIEVANCE RESPONSE

C214

John Walton, #173849
LMF-02-04-1615-06a

The Grievant presents an issue which alleges racial discrimination which regard to the length of time he was placed on upper slot restriction. He alleges that a white prisoner was given a different length of time for the same offense. The grievance was processed at the local level according to the provisions of Policy Directive 03.02.130 (Prisoner/Parolee Grievances) and Operating Procedure 03.02.130 (Prisoner/Parolee Grievances).

This investigator has reviewed the documents presented with the appeal to Step Three. **It is noted that the Grievant became insolent during the Step One interview and was issued an Insolence ticket. This behavior does not show a good faith effort to resolve this issue.** All relevant information was considered. Based on this review, this writer finds the responses provided at Step One and Step Two adequately address the merits of the main issue grieved. The evidence presented does not support the charges made by the Grievant. He did not show a violation of policy. The Step Three appeal is denied.

Approval Signature: Michael A. Powell Date: JUN 11 2002
#6/6-6/06a

Nos. 05-7058 and 05-7142

Supreme Court, U.S.
FILED
AUG 14 2006
OFFICE OF THE CLERK

In The
Supreme Court of the United States

LORENZO L. JONES,

Petitioner,

v.

BARBARA BOCK, *et al.*,

Respondents.

TIMOTHY WILLIAMS,

Petitioner,

v.

WILLIAM OVERTON, *et al.*,

Respondents.

JOHN H. WALTON,

Petitioner,

v.

BARBARA BOUCHARD, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR THE PETITIONERS

JEAN-CLAUDE ANDRE
Counsel of Record
IVEY, SMITH & RAMIREZ
2602 Cardiff Ave.
Los Angeles, CA 90034-1843
(310) 558-0932

TOCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether satisfaction of the PLRA's exhaustion requirement is a prerequisite to a prisoner's federal civil rights suit such that the prisoner must allege in his complaint how he exhausted his administrative remedies (or attach proof of exhaustion to the complaint), or instead, whether non-exhaustion is an affirmative defense that must be pleaded and proven by the defense. (**No. 05-7058 only**)

2. Whether the PLRA requires a prisoner to name a particular defendant in his or her administrative grievance in order to exhaust his or her administrative remedies as to that defendant and to preserve his or her right to sue them. (**No. 05-7142 only**)

3. Whether the PLRA prescribes a "total exhaustion" rule that requires a federal district court to dismiss a prisoner's federal civil rights complaint for failure to exhaust administrative remedies whenever there is a single unexhausted claim, despite the presence of other exhausted claims. (**No. 05-7058 and No. 05-7142**)

LIST OF PARTIES TO THE PROCEEDINGS

Jones **(No. 05-7058)**: Barbara Bock (named in the caption), Valerie A. Chaplin, Paul Morrison, and Michael Opanasenko were defendants in the district court and appellees in the court of appeals and are respondents here. Janet Konkle and Ahmad Aldabagh were named as defendants but never served and, therefore, did not appear in the district court or court of appeals and are not respondents here.

Williams **(No. 05-7142)**: William Overton (named in the caption), David Jamrog, Mary Jo Pass, Paul Klee, Chad Markwell, and Bonnie Peterson were defendants in the district court and appellees in the court of appeals and are respondents here. George Pramstaller was named as a defendant but never served and, therefore, did not appear in the district court or court of appeals and is not a respondent here.

Walton **(No. 05-7142)**: Barbara Bouchard (named in the caption), Ken Gearin, David L. Bergh, Catherine S. Bauman, Denise Gerth, and Rob Bobo were defendants in the district court and appellees in the court of appeals and are respondents here.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals in *Jones* (No. 05-7058) (JAI 44-46) is unreported but is *available at* 135 Fed. Appx. 837. The district court's judgment (JAI 43) and order adopting the magistrate judge's report and recommendation (JAI 40-42) and the magistrate judge's report and recommendation (JAI 18-39) itself are all unreported.

The opinion of the court of appeals in *Williams* (No. 05-7142) (JAI 110-16) is unreported but is *available at* 136 Fed. Appx. 859. The district court's judgment (JAI 108-09) and order adopting the magistrate judge's report and recommendation (JAI 106-07) and the magistrate judge's report and recommendation (JAI 76-105) itself are all unreported.

The opinion of the court of appeals in *Walton* (No. 05-7142)[1] (JAI 168-73) is unreported but is *available at* 136 Fed. Appx. 846. The district court's judgment (JAI 167) and order adopting the magistrate judge's report and recommendation (JAI 165-66) and the magistrate judge's report and recommendation (JAI 158-64) itself are all unreported.

JURISDICTION

The judgment of the court of appeals in *Jones* (No. 05-7058) was entered on June 15, 2005. On September 2, 2005, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including October 13, 2005. The petition for a writ of certiorari was

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[1] *Williams* and *Walton* share the same case number because they were the subject of a joint petition filed pursuant to Supreme Court Rule 12.4.

filed on October 13, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

The judgment of the court of appeals in *Williams* (No. 05-7142) was entered on June 22, 2005. On September 13, 2005, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including October 20, 2005. The petition for a writ of certiorari was filed on October 17, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

The judgment of the court of appeals in *Walton* (No. 05-7142) was entered on June 17, 2005. On September 2, 2005, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including October 17, 2005. The petition for a writ of certiorari was filed on October 17, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of the Prison Litigation Reform Act of 1995 (PLRA), 28 U.S.C. 1915A and 42 U.S.C. 1997e, are set forth in an appendix to this brief.

STATEMENT

Before prisoners may challenge in federal court a condition of their confinement, the Prison Litigation Reform Act (PLRA), 42 U.S.C. 1997e, requires prisoners to first exhaust available administrative remedies by pursuing to completion whatever inmate grievance and/or appeal procedures their custodians provide. Petitioners, each in the custody of the Michigan Department of Corrections (MDOC), pursued their grievances at each level of the MDOC's grievance system and received final decisions

denying their grievances. Nonetheless, in these consolidated cases, the court of appeals held that petitioners' federal civil rights complaints must be dismissed in their entirety because they failed to satisfy certain extra-statutory rules that, according to the court of appeals, the PLRA's exhaustion mandate requires. Specifically, the court of appeals held that to satisfy the PLRA's exhaustion requirement, prisoners must (1) either specifically allege in their complaints how and when they exhausted their administrative remedies or attach to their complaints proof of exhaustion, (2) have identified each individual in their initial administrative grievance whom they later name as a defendant in their subsequent civil rights complaints, and (3) not join in their complaints any unexhausted claims or defendants not named in their initial grievances with exhausted claims or defendants, lest their complaints be dismissed in their entirety. Petitioners seek reversal of these holdings.

A. The Prison Litigation Reform Act

Congress enacted the PLRA in 1996 in response to a significant increase in prisoner litigation in the federal courts. *Woodford v. Ngo*, 126 S.Ct. 2378, 2382 (2006). Its goals, as reflected by its supporters and recognized by this Court, were to "reduce the quantity and improve the quality of prisoner suits," *Porter v. Nussle*, 534 U.S. 516, 524 (2002), while not "prevent[ing] inmates from raising legitimate claims," 141 Cong. Rec. S14627 (daily ed. Sep. 29, 1995) (statement of Sen. Hatch).

To accomplish these goals, Congress included "a variety of provisions" in the PLRA, a "centerpiece" of which "is an 'invigorated' exhaustion provision, § 1997e(a)." *Ngo*, 126 S.Ct. at 2382 (quoting *Porter*, 534 U.S. at 524). Before the PLRA's enactment, the requirement that a prisoner exhaust administrative remedies before commencing an

action under 42 U.S.C. 1983 was "in large part discretionary." *Porter*, 534 U.S. at 523. The then-governing statute authorized a district court, if it "believe[d] that such a requirement would be appropriate and in the interests of justice," to stay the prisoner's action for a period not to exceed 180 days while the prisoner exhausted administrative remedies. Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, 94 Stat. 352 (1980), as amended, 42 U.S.C. 1997e (1994). The Court described this provision as a "limited exhaustion requirement." *McCarthy v. Madigan*, 503 U.S. 140, 150-51 (1992).

The PLRA's new exhaustion prescription provides that "[n]o action shall be brought with respect to prison conditions * * * by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. 1997e(a). Under § 1997e(a), "[e]xhaustion is no longer left to the discretion of the district court, but is mandatory"; "a prisoner must now exhaust administrative remedies even where the relief sought * * * cannot be granted by the administrative process"; and "exhaustion of administrative remedies is required for any suit challenging prison conditions, not just for suits under § 1983." *Ngo*, 126 S.Ct. at 2382-83. Moreover, as this Court recently recognized in *Ngo*, when Congress made exhaustion mandatory, it commanded "proper exhaustion * * * which 'means using all steps that the agency holds out, and doing so properly (so that the agency addresses the issues on the merits).'" *Id.* at 2385 (quoting *Pozo v. McCaughtry*, 286 F.3d 1022, 1024 (CA7), cert. denied, 537 U.S. 949 (2002)). According to the Court, Congress' requirement of "proper exhaustion" ensures that, on one hand, prisons have a "fair opportunity to correct their own errors," *id.* at 2388; see also *Porter*, 534 U.S. at 524-25 (holding that exhaustion "afford[s] corrections officials time and opportunity to address complaints

internally before allowing the initiation of a federal case"), and, on the other, that prisoners will have "a meaningful opportunity * * * to raise meritorious grievances" and, if necessary, to seek judicial review, *Ngo*, 126 S.Ct. at 2392.

The PLRA also attempts to accomplish Congress' goals of reducing the quantity and improving the quality of prisoner suits while not barring legitimate claims:

- by limiting the claims a prisoner may bring, see 42 U.S.C. 1997e(e) (barring a prisoner's "Federal civil action * * * for mental or emotional injury suffered while in custody without a prior showing of physical injury"),
- by expediting resolution of prisoner suits, see 28 U.S.C. 1915A(1)(a) (providing for district courts to "review, before docketing, if feasible or, in any event, as soon as practicable after docketing" a prisoner's civil complaint to "identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint – (1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or (2) seeks monetary relief from a defendant who is immune from such relief"),
- by allowing courts to dismiss "without first requiring the exhaustion of administrative remedies" any "*claim* [that] is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief," 42 U.S.C. 1997e(c)(2) (emphasis added), and
- by allowing a court to dismiss "on its own motion or on the motion of a party * * * any *action* brought with respect to prison conditions * * * if the court is satisfied that the *action* is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a

defendant who is immune from such relief," *id.* § 1997e(c)(1) (emphasis added).

B. The Sixth Circuit's Judicial Embellishments of the PLRA's Exhaustion Requirement

The Sixth Circuit has engrafted onto the PLRA's exhaustion requirement a series of procedural trappings that it subsequently used to justify the dismissal of petitioners' complaints. Because the Sixth Circuit affirmed the dismissals of petitioners' complaints in unpublished decisions that simply followed the prior decisions in which it created these judge-made obstacles to merits review, we briefly review the Sixth Circuit's prior decisions here.

1. The "Plead and Show Exhaustion" Rule

Relevant to the first question presented, the Sixth Circuit held in *Brown v. Toombs*, 139 F.3d 1102, 1104 (CA6), cert. denied, 525 U.S. 833 (1998), "that prisoners filing § 1983 cases involving prison conditions must allege and show that they have exhausted all available state administrative remedies. A prisoner should attach to his § 1983 complaint the administrative decision, if it is available, showing the administrative disposition of his complaint." *Brown* further admonished district courts to "enforce th[is] exhaustion requirement *sua sponte* if not raised by the defendant." *Ibid.* In *Knuckles-El v. Toombs*, 215 F.3d 640, 642 (CA6), cert. denied, 531 U.S. 1040 (2000), the court clarified that, if written documentation of exhaustion is unavailable to a PLRA plaintiff at the time they file their complaint, they must "describe with specificity the administrative proceeding and its outcome" to avoid dismissal under *Brown*. And in *Baxter v. Rose*, 305 F.3d 486, 489 (CA6 2002), the court added "that a [PLRA] plaintiff, who fails to make a sufficient allegation of exhaustion in their initial complaint [as

required by *Brown* and *Knuckles-El*,] not be allowed to amend his complaint to cure the defect."

2. The "Name All Defendants" Rule

Relevant to the second question presented, the Sixth Circuit held in *Curry v. Scott*, 249 F.3d 493, 505 (CA6 2001), "that a prisoner [must] file a grievance against the person he ultimately seeks to sue." In *Burton v. Jones*, 321 F.3d 569, 575 (CA6 2003), the court clarified that "for a court to find that a prisoner has administratively exhausted a claim against a particular defendant, a prisoner must have alleged mistreatment or misconduct on the part of the defendant at Step I of the grievance process." In *Thomas v. Woolum*, 337 F.3d 720, 734, 735 (CA6 2003), the court reiterated that prisoners must "file grievances 'against' specific defendants" but indicated that "an inmate need not identify each officer by name when the identities of the particular officers are unknown."

3. The "Total Exhaustion" Rule

Relevant to the third question presented, the Sixth Circuit held in *Jones Bey v. Johnson*, 407 F.3d 801, 805 (CA6 2005), pet. for cert. pending, No. 05-874 (filed Jan. 9, 2006), that "the PLRA's exhaustion requirement applies such that a 'mixed' complaint, alleging both exhausted and unexhausted claims, must be completely dismissed for failure to exhaust administrative remedies."[2]

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[2] The Sixth Circuit recently called into doubt and refused to follow *Jones Bey*. See *Spencer v. Bouchard*, 449 F.3d 721, 726 (CA6 2006); see also *Bell v. Konteh*, 450 F.3d 651, 654 n.5 (CA6 2006). This development does not affect the reviewability of these cases. The judgments of the court of appeals are final, and only this Court can offer petitioners the relief they seek. Moreover, this development does not resolve the

(Continued on following page)

These rules operate cumulatively so that the slightest pleading error may mandate the dismissal of a complaint raising multiple meritorious claims, some or even all of which have in fact been exhausted. Thus, a prisoner who fails to allege with specificity exhaustion against a single defendant will have his entire complaint dismissed with no chance to cure by amendment what may be only a drafting omission or an instance where the prisoner did not have the necessary information at the time of the grievance.

C. Michigan's Prison Grievance System

Michigan has a prison grievance system for prisoners who seek to challenge the conditions of their confinement.

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intractable split among the circuits. The two other circuits with a "total exhaustion" rule have continued to apply it even after *Spencer*. See *Abdul-Muhammad v. Kempker*, 450 F.3d 350, 352 (CA8 2006) ("§ 1997e(a) requires that the inmate exhaust all available prison grievance remedies as to all of his claims prior to filing suit in federal court."); *Boyd v. Ferguson*, No. 05-1543, 2006 WL 1793267, *2 (CA10 June 30, 2006) ("Because Boyd did not completely exhaust administrative remedies for all of his claims, § 1997e(a) requires his complaint to be dismissed."). And the two circuits that have rejected the "total exhaustion" rule, see *Lira v. Herrera*, 427 F.3d 1164, 1170 (CA9 2005), petition for cert. pending, No. 05-878 (filed Jan. 6, 2006); *Ortiz v. McBride*, 380 F.3d 649, 656-63 (CA2 2004), cert. denied, 125 S.Ct. 1398 (2005), will not likely have an occasion to revisit their prior decisions on the issue because their rejection of the "total exhaustion" rule is unlikely to be presented again on appeal. Accordingly, this development simply means that there is now a split within the Sixth Circuit, just as there is a split among the circuits. Finally, it would be imprudent for this Court not to resolve this issue now. At least two circuits that have not yet taken a position on the issue have expressly deferred submission of their lead cases presenting the issue pending this Court's resolution of these consolidated cases. See Clerk's Letter, *Walker v. Zenk*, No. 03-3298 (CA3 May 31, 2006) (deferring oral argument pending *Jones*); Court Order, *Al-Amin v. Johnson*, No. 05-6455 (CA4 July 10, 2006) (placing case in abeyance pending *Jones* and *Williams*).

"The total grievance process * * * shall be completed within 90 calendar days unless an extension of 15 business days has been requested by [the MDOC] and has been granted by the grievant." MDOC Policy Directive (PD) No. 03.02.130 ¶ (V) (Nov. 1, 2000).[3] To initiate the process, an inmate must first "attempt to verbally resolve the issue with the staff member involved within two business days after becoming aware of a grievable issue." *Id.* ¶ (T). "If the complaint is not resolved, the grievant may file a Step I grievance," *ibid.*, "within five business days," *id.* ¶ (Y), except that in certain cases a prisoner may bypass Steps I and II and proceed directly to Step III, see *id.* ¶ (GG) (allowing prisoners to proceed directly to Step III when alleging "racial or ethnic discrimination and staff brutality or corruption").

To initiate a Step I grievance, a prisoner must "use the Prisoner/Parolee Grievance form (CJS-247A)." *Id.* ¶ (U). The inmate must complete two parts of the form, which instructs that the inmate should "[b]e brief and concise in describing [the] grievance issue." E.g., JAII 1. The first part requires the prisoner to describe his or her "attempt * * * to resolve this issue prior to writing this grievance." *Ibid.* The second requires the prisoner to "[s]tate [the] problem clearly." *Ibid.* The information to be provided shall be "limited to the issue being grieved" and only need

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[3] The full-text of the PD effective when petitioners participated in the MDOC's grievance system is part of the record on appeal and is reproduced at pages 138 through 157 of the Joint Appendix. For simplicity, we cite to it throughout this brief by applicable paragraph, rather than by Joint Appendix page number.

Michigan has since revised the PD, and as of the printing of this brief, respondents represented that they would reproduce the new version as an appendix to their brief. Because petitioners participated in the MDOC grievance system governed by the old PD, the new PD is irrelevant to these cases.

"be as specific as possible." PD ¶ (U). And, although "[a]dditional pages may be attached, if necessary, * * * grievants are encouraged to limit the information to the grievance form." *Ibid.*

Once a Step I grievance is submitted, a grievance coordinator "shall assign an appropriate respondent" who "shall generally be the supervisor of the person being grieved." *Id.* ¶ (Z). After the respondent interviews the prisoner and "gather[s] any additional information needed to respond to the grievance," *id.* ¶ (AA), the respondent will complete the bottom portion of the form and "return [it] to the grievant * * * within 15 business days, unless an extension has been granted," *id.* ¶ (CC). If a prisoner "is dissatisfied with the response received at Step I, s/he may request a Prisoner/Parolee Grievance Appeal form (CSJ-247B) from the Step I Grievance Coordinator within five business days after receiving the Step I response," *id.* ¶ (DD); see also *id.* ¶ (U), and "appeal to Step II," *id.* ¶ (T), "within five business days after receiving the CSJ-247B from the Step I Grievance Coordinator," *id.* ¶ (DD).

The Step II appeal form simply requires the prisoner to state his or her "[r]eason for appeal." E.g., JAII 4. Once a Step II grievance is submitted, the Grievance Coordinator "shall [again] assign an appropriate respondent," who shall generally be "[t]he Warden * * * except that s/he may delegate this responsibility to the appropriate Deputy Warden if more than one institution is supervised" or, *inter alia*, "[t]he Regional Health Care Administrator or designee in grievances alleging inadequate medical care." PD ¶¶ (EE)(1) & (4). "[W]ithin 15 business days after receipt of the Step II grievance, unless an extension is granted," *id.* ¶ (FF), the Step II respondent shall inform the prisoner of the outcome on the prisoner's CSJ-247B from, e.g., JAII 4, and return it to the prisoner, PD ¶ (FF).

"If the grievant is dissatisfied with the Step II response, or does not receive a timely response, s/he may appeal to Step III," *Id.* ¶ (T), by filling out the bottom of the CSJ-247B form, stating his or her "[r]eason for appeal," e.g., JAII 4; see also PD ¶ (U), and "submitting it * * * within ten business days after receiving the Step II response," *id.* ¶ (GG). "The Director or designee shall be the respondent for Step III grievances," *id.* ¶ (HH), and provides his or her decision on a sheet of paper separate from the CSJ-247 form, e.g., JAII 4.

D. Factual and Procedural Background

1. *Jones* (No. 05-7058). On November 14, 2000, petitioner Jones was in a motor vehicle accident while incarcerated at the MDOC's Saginaw Correctional Facility (SCF). JAI 19. Jones suffered multiple serious injuries, including a cervical spine fracture and dislocation with injury to the spinal cord, which required fusion surgery; a broken arm; lower back injuries; upper and lower extremity weakness on his left side; and numbness below his neck. *Ibid.* Approximately seven months after the accident – but while Jones was still wearing neck and leg braces, utilizing a walking cane, and medicated with a muscle relaxant – the SCF's Classification Director, respondent Paul Morrison, assigned Jones to work as a "Big Yard Equipment Handler." *Id.* at 19-20. This position required Jones to lift items, stand, bend, stoop, and distribute athletic equipment to other inmates. *Id.* at 19. Jones notified Morrison and the officer to whom Jones was ordered to report, respondent Correctional Officer Michael Opanasenko, of his injuries, but his assignment was not changed. *Id.* at 19-20. Reluctantly, Jones reported to his work assignment but aggravated his injuries while attempting to complete his duties. *Id.* at 20. Opanasenko accused Jones of faking his injuries; threatened

Jones with discipline if he did not perform his duties satisfactorily; repeatedly harassed Jones; and in retaliation for complaining about his injuries, issued Jones a negative work evaluation. *Id.* at 9, 12-13.

On September 15, 2001, Jones filed a two-page typewritten Step I grievance, complaining that "Opanasenko, Health Care, Classification, Deputy Warden, and Warden * * * required [him] to work beyond that of his physical capabilities,"[4] that Opanasenko harassed and retaliated against him for complaining about his injuries, and that Opanasenko's negative work evaluation "will add to a negative probability for parole." JAII 1-2. Addressing only Jones' negative work evaluation and refusing to expunge it, Jones' Step I grievance was denied in an undated and unsigned response. *Id.* at 3. Jones appealed to Step II, claiming (1) that the Step I respondent failed to respond to Jones' work assignment claim against "Health Care, Warden [Barbara] Bock, Deputy Warden of Programs, Classification Director and Opanasenko" and (2) that removing his negative work evaluation – which the Step I respondent refused to do – was a necessary but incomplete remedy. *Id.* at 4. On October 30, 2001, Bock responded to

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[4] It is not clear when Jones learned the identities of all of the unnamed individuals who held these positions. Although respondents argued in their motion to dismiss that Jones' complaint should be dismissed because he failed to "exhaust the grievance procedure as to *each* claim against *each* defendant named in the complaint," Pet. App. 32a, the magistrate judge rejected this argument on the basis that "where a plaintiff lists a particular position that is held by only one person, [the exhaustion] requirement should be considered met," JAI 37. Respondents failed to object to that portion of the magistrate judge's report and recommendation and have, therefore, waived any challenges to it. See *Thomas v. Arn*, 474 U.S. 140, 147-48 (1985) (holding that only specific objections to the magistrate's report made to the district court will be preserved for appellate review; making some objections but failing to raise others will not preserve all the objections a party may have).

Jones' Step II appeal and partially resolved it by ordering that Jones' negative work evaluation "will be removed" from his file. *Id.* at 5. Bock denied Jones' work-assignment claim on the merits, finding that Jones "was appropriately given the job detail." *Ibid.* Dissatisfied with Bock's partial resolution at Step II, Jones appealed his grievance to Step III on November 3, 2001. *Id.* at 6-7. On December 11, 2001, the MDOC issued its response, finding that "the responses provided at Step One and Step Two adequately address[ed] the merits" of Jones' claims. *Id.* at 8.

Still dissatisfied, on November 15, 2002, Jones filed a *pro se* 42 U.S.C. 1983 federal civil rights complaint in the United States District Court for the Eastern District of Michigan. JAI 7-17. In addition to Opanasenko, the State of Michigan, and the MDOC, Jones – now aware of some of the identities of the individuals whom he had named only by title in his grievances – named respondents Bock, Valerie Chaplin (SCF's Deputy Warden of Programs), and Morrison. *Id.* at 7-9. Still unaware of the identities of the relevant "Health Care" defendants, Jones named two Doe defendants.[5] *Id.* at 7, 9.

Jones alleged that all six individual defendants were deliberately indifferent to his medical needs in violation of the Eighth and Fourteenth Amendments; that Opanasenko and Chaplin also violated his First Amendment rights by retaliating against him for complaining about his injuries;

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[5] Subsequently, Jones moved to substitute Janet Konkle, R.N., and Ahmad Aldabaugh, M.D., for the Doe "Health Care" defendants, see 02-cv-74336 Mot. to Name Defs. 1 (E.D. Mich. filed Jan. 13, 2003) (Dkt. No. 11), and on January 17, 2003, the district court granted Jones' motion, 02-cv-74336 Order 1 (E.D. Mich. filed Jan. 17, 2003) (Dkt. No. 13); see also JAI 20. For reasons unknown, these defendants were neither served nor signed waivers of service. JAI 20. Accordingly, they did not appear in the court of appeals and are not respondents here.

and that the MDOC and State of Michigan were liable under a respondeat superior theory of liability.[6] *Id.* at 13-14, 16. Jones' complaint explained that he exhausted all administrative remedies available to him and provided the dates on which he filed his Step I grievance and his Step II and Step III appeals and the dates on which he received the institution's responses.[7] *Id.* at 8. Jones neither attached copies of any of the documents from his grievance and appeals nor described with particularity the remedies he pursued or the outcome of the administrative proceedings. *Id.* at 46.

On February 13, 2003, respondents moved to dismiss Jones' complaint. Pet. App. 26a-35a. Respondents attached to their motion copies of Jones' grievance, his appeal forms, and the MDOC's responses. See JAI 28-29. On February 21, 2003, and March 28, 2003, Jones opposed respondents' motion and attached to his oppositions the proof of exhaustion that he had failed to attach to his complaint but that respondents had provided with their motion. Pet. App. 36a-51a; see also JAI 28.

The magistrate judge to whom respondents' motion was referred recommended that Jones' claims against Bock, Chaplin, Konkle, and Aldabaugh be dismissed for failure to state a claim because Jones failed to assert that any of them knew or should have known that Jones' work assignment would place him in serious risk of harm. JAI 26-27. In contrast, the magistrate recommended that

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[6] On November 19, 2002, the district court dismissed the State of Michigan and the MDOC, finding them entitled to Eleventh Amendment immunity. See 02-cv-74336 Order 2 (E.D. Mich. filed Nov. 19, 2002) (Dkt. No. 4); see also JAI 21. Jones does not challenge this order.

[7] At the time he filed his complaint, Jones had not yet received the MDOC's Step III response, JAI 8, although subsequent development of the record revealed that the Step III response was issued on December 11, 2001, Pet. App. 29a; see also JAII 8.

Jones' claims against Morrison and Opanasenko not be dismissed because Jones stated claims against them and exhausted his administrative remedies as to those claims. *Id.* at 33-38. The magistrate rejected respondents' argument that the entirety of Jones' complaint be dismissed because Jones failed to attach to his complaint proof of exhaustion or describe with particularity in his complaint how he exhausted his claims. *Id.* at 33. According to the magistrate, *who* provided proof of exhaustion, *when* it was provided, and *how* it was provided were irrelevant because all of that information was present in the record by the time the case was referred to him for evaluation and because his ability to evaluate the case expeditiously was unaffected. *Ibid.* In essence, the magistrate found that, by providing proof of exhaustion with their motion to dismiss, respondents cured – or rendered harmless – Jones' pleading error. See *ibid.* Jones, Morrison, and Opanasenko filed objections to the magistrate's report and recommendation. *Id.* at 40.

Reviewing the magistrate's report and recommendation *de novo*, the district court dismissed Jones' complaint in its entirety. The district court adopted the magistrate's recommendation that Jones' claims against Bock, Chaplin, Konkle, and Aldabaugh be dismissed but rejected his recommendation that Jones' claims against Morrison and Opanasenko should go forward. *Id.* at 41. Unlike the magistrate, the district court found that "the documentation regarding grievances supplied by [respondents] as part of their motion to dismiss does not cure [Jones'] failure to properly plead exhaustion." *Id.* at 42. The district court also found that Jones' attachment of proof of exhaustion to his opposition did not cure his pleading failure. *Id.* at 41-42. Specifically, the district court construed Jones' late provision of proof of exhaustion as an attempt to amend his complaint and, relying on *Baxter*, held that Sixth Circuit law prohibited PLRA plaintiffs from doing so. *Id.* at 42. Jones appealed.

The court of appeals affirmed, finding that the district court's dismissal of Jones' complaint was proper for two reasons. First, rather than consider Jones' challenge to the district court's dismissal of his claims against Bock, Chaplin, Konkle, and Aldabaugh for failure to state a claim, the court of appeals held that Jones' failure to comply with its heightened pleading requirement for PLRA plaintiffs was fatal to his *entire* complaint. *Id.* at 46. The court of appeals also held that *Baxter* precluded Jones from offering proof of exhaustion by attaching it to his opposition to respondents' motion to dismiss. *Ibid.* Relying on *Jones Bey*, the court held alternatively that, "even if Jones had shown he had exhausted some of his claims, the district court properly dismissed the complaint because Jones did not show that he had exhausted *all* of his claims." *Ibid.* (emphasis added).

2. *Williams* (No. 05-7142). Petitioner Williams has suffered from "noninvoluting cavernous hemangiomas" in his right arm since birth. JAI 111. This condition causes tumors to grow and results in disfigurement. *Ibid.* On March 29, 2001, Williams underwent surgery to remove a hemangioma and to relieve the pain accompanying his condition. *Ibid.* While Williams was incarcerated at the MDOC's Standish Maximum Facility (SMF), Williams went to K. Nimr Ikram, D.O., on August 8, 2001, and January 11, 2002, for consultations. *Ibid.* At both consultations, further surgery to remove additional hemangiomas and to straighten Williams' wrist was discussed. *Ibid.* Following the second consultation, Dr. Ikram referred Williams to hand surgeon Raymond C. Noellert, M.D., for further "surgery to straighten out his wrist and get function back in his finger." *Id.* at 79. On March 5, 2002, Dr. Noellert authorized Williams' surgery. *Id.* at 111.

On March 23, 2002, SMF's medical service provider, J. Hoffman, D.O., reported to the MDOC's Correctional Medical Services department (CMS) that Williams was "a

candidate for contracture release" and indicated that he would "call for authorization." *Id.* at 80-81. CMS, however, denied permission to proceed with the surgery, asserting that "functional return of the hand is not a known result. Surgery would be cosmetic and dangerous." *Id.* at 81. On March 26, 2002, Hoffman appealed the denial on the basis that "the request is for pain relief, not to regain function." *Id.* at 81. CMS rejected Hoffman's appeal, stating that "[h]and surgery will accomplish nothing" and stressing the "probable futility of it." *Id.* 81. On April 8, 2002, Hoffman again appealed, reiterating that "the request is to have surgery to relieve pain, not correction of the hand." *Id.* at 81. CMS indicated in response that the "case will be presented at [an upcoming] MDOC MAC [Medical Advisory Committee] meeting." *Id.* at 81.

Having not received any treatment or heard the results of the MAC meeting, on June 7, 2002, Williams filed a hand-written Step I grievance complaining that he had requested medical follow-up care and had not been treated. JAII 9. Although Williams did not name any individuals in the grievance, he incorporated by reference and attached to his grievance various correspondence with a registered nurse in SMF's Health Care Department, K. Wright, indicating that his "immediate concern" was whether his surgery had been approved. *Id.* at 10-13. Wright denied the grievance, explaining that "[a]ll of Williams' M.D.O.C. M.A.C. appeals were denied. * * * M.D.O.C. refused the surgery." *Id.* at 9.

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* CMS notifies MDOC medical service providers, like Dr. Hoffman, of its decision to deny or delay medical treatment authorized by the provider on a one-page form. (CMS Form CHJ-408). See 02-cv-75133 Compl. Exh. H (E.D. Mich. filed Jan. 7, 2003) (Dkt. No. 3). The provider is then given an opportunity to appeal the denial on the same form, and if the denial is upheld, to appeal a second time. *Ibid.*

Williams appealed to Step II, explaining that "[a]ny prior MDOC/MCA/CMS Appeals for surgery/therapy was not forever/final" and that "Orthopedics Expert Doctor and Physical Therapist adamantly said I need surgery/therapy." *Id.* at 14. The MDOC denied Williams' Step II appeal, explaining that "[a]ppropriate care has been given" but that further consultation with the MDOC's Bureau of Health Care Services Regional Medical Officer, defendant George Pramstaller, M.D., was planned. *Id.* at 15.

Williams appealed to Step III. *Id.* at 16. Williams explained that "Dr. Pramstaller has never conducted personal exam on me, is advocate for CMS to cut costs instead of providing treatment. Please help." *Ibid.* Williams' Step III appeal was denied on the bases that "[a]ll relevant information was considered," that "the responses provided at Step One and Step Two adequately address the merits of the main issue grieved," and that "[t]he medical opinions from professionals, such as doctors and nurses, will not be questioned by this office due to the technical expertise of the profession." *Id.* at 17.

After being transferred from SMF to the MDOC's Gus Harrison Correctional Facility (GHF), Williams requested on August 13, 2002, placement in a "handicapped accessible cell" to accommodate his condition. *Id.* at 22. Having not received a response, Williams filed a two-page typewritten Step I grievance on August 20, 2002, against GHF's Warden, respondent David Jamrog, requesting the same accommodation or, alternatively, a transfer back to one of two facilities that had previously provided Williams the accommodation. *Id.* at 20-21. Williams incorporated by reference and attached to his grievance various documents supporting his accommodation request. *Id.* at 22-27. Williams' grievance was denied on the bases that he already received assistance and a bottom bunk, that he was housed on a handicap wing, and that "[i]t appear[ed] that [he was]

trying to use [his] handicapp [sic] to get transfered [sic] to a facility of [his] choice." *Id.* at 20. Williams appealed the denial through Steps II and III of the grievance process, but his appeals were denied. *Id.* at 18, 28-30.

On September 9, 2002, Williams filed a three-page handwritten Step I grievance against GHF's Deputy Warden of Programs, respondent Mary-Jo Pass, again seeking a handicapped-accessible cell. *Id.* at 31-33. The same day, but apparently unrelated to his pending grievance, Williams was placed in a single-occupancy handicapped-accessible cell by a resident unit supervisor. JAI 67, JAII 44. Williams was removed from the cell the following day at the behest of respondent GHF Correctional Officer Chad Markwell because Williams' "health care detail" did not provide for it. JAI 67-68, JAII 43. The same day that Williams was removed from his single-occupancy cell, he filed a two-page handwritten Step I grievance against Markwell for, among other things, having him removed. JAII 43-44. Williams also filed Step I grievances against the GHF's Deputy Warden for Housing, respondent Paul Klee, and the GHF's Health Facility Manager, respondent Bonnie Peterson challenging the GHF's refusal to provide a single-occupancy cell. *Id.* at 50, 52, 54-56. Williams unsuccessfully appealed the denial of all of these grievances through Steps II and III. *Id.* at 31-64.

On January 7, 2003, Williams filed a *pro se* § 1983 federal civil rights complaint in the United States District Court for the Eastern District of Michigan against respondents MDOC Director William Overton, Jamrog, Klee, Markwell, Pass, and Peterson and defendant Pramstaller.[9]

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[9] Pramstaller was never served and, therefore, was not an appellee in the court of appeals and is not a respondent here. However, the failure to serve Pramstaller appears to have been due to the United States Marshal's lack of diligence. Accordingly, the magistrate noted

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JAI 52-75. Williams alleged that the denial of surgery and refusal to provide a handicapped-accessible cell violated Williams' rights under the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.*; section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794; and the Eighth and Fourteenth Amendments. JAI 70-71.

In lieu of filing an answer, on April 15, 2003, respondents moved to dismiss, or alternatively for summary judgment on, the entirety of Williams' complaint. *Id.* at 77. On July 22, 2003, the magistrate to whom the case was referred recommended that respondents' motion be granted. *Id.* at 76-105. The magistrate recommended that respondents' motion to dismiss should be granted as to Williams' denial of surgery claim because he failed to name any of the respondents in the grievance underlying this claim, and therefore, had failed to exhaust his administrative remedies. *Id.* at 85-86. Having already recommended that Williams' denial of surgery claim be dismissed for failure to exhaust, the magistrate applied the "total exhaustion" rule to Williams' single-occupancy cell accommodation claim[10] and

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that, if her report and recommendation were rejected – which would presumably include it being rejected after appeal – she would order the Marshal to again attempt to serve him. JAI 104 n.10.

[10] At the time the magistrates and district courts applied the "total exhaustion" rule to Williams' and Walton's complaints, the rule had not yet been endorsed by the Sixth Circuit. See *Knuckles-El*, 215 F.3d at 642 ("We reserve to another day the question of whether exhausted claims in a 'mixed' complaint should be dismissed * * * or whether such a complaint should be dismissed in its entirety."). By the time the Sixth Circuit considered Williams' and Walton's appeals, however, *Jones Bey* had adopted the "total exhaustion" rule as law of the circuit. See 407 F.3d at 805 ("[T]he PLRA's exhaustion requirement applies such that a 'mixed' complaint, alleging both exhausted and unexhausted claims, must be completely dismissed for failure to exhaust administrative remedies."); see also *id.* at 806 ("We now * * * hold[ ] that total exhaustion is required under the PLRA.").

recommended that Williams' entire complaint be dismissed. *Id.* at 93-101. Over Williams' objections, on October 31, 2003, the district court accepted and adopted the magistrate's recommendations "with regards to the failure to exhaust administrative remedies issue" and dismissed Williams' complaint in its entirety. *Id.* at 107.

On June 22, 2005, the court of appeals affirmed the judgment of the district court with analysis that tracked the magistrate's report and recommendation. *Id.* 110-16. Relying on its prior decisions in *Curry*, *Burton*, and *Thomas*, the court of appeals affirmed the dismissal of Williams' denial of surgery claim because his "grievance failed to specifically name any of the appellees that Williams has named in his complaint," even though he "did file a grievance based on the denial of medical treatment, and he appealed the grievance through Steps II and III of the grievance process." *Id.* at 114-15. Having affirmed the dismissal of Williams' denial of surgery claim, the court of appeals applied *Jones Bey*'s "total exhaustion" rule to affirm the dismissal of Williams' single-occupancy cell accommodation claim "despite the fact that he appears to have exhausted his administrative remedies" with respect to this claim. *Id.* at 114.

3. *Walton* (No. 05-7142). On July 17, 2001, petitioner Walton allegedly assaulted a correctional officer at the MDOC's Alger Maximum Correctional Facility (AMF). *Id.* at 169. The institution punished Walton by sanctioning him with an "upper slot restriction" for an indefinite period of time. *Ibid.* Nearly a year later, in April 2002, Walton, an African American, filed a one-page handwritten Step I grievance against one of the AMF's assistant deputy wardens, respondent Ron Bobo, asserting that the indefinite upper slot restriction was discriminatorily disproportionate to the definite thirty to sixty day upper slot restrictions given to white prisoners for similar

assaults. JAII 65. In support of his claim, Walton identified a white prisoner who had received a definite upper slot restriction for a similar infraction. *Ibid.* Walton's Step I grievance did not name any other MDOC staff. *Ibid.*

On April 26, 2002, respondent AMF Case Manager Denise Gerth denied Walton's Step I grievance and indicated that a different assistant deputy warden, respondent Ken Gearin, had placed Walton on the indefinite upper slot restriction and that racial discrimination had nothing to do with Gearin's decision. *Id.* at 66. Respondent AMF Resident Unit Manager Catherine S. Bauman reviewed and approved Gerth's denial of Walton's Step I grievance. *Ibid.*

On May 4, 2002, Walton appealed to Step II, restating his allegations from Step I and asserting racial discrimination on the part of "corrupt administration[ ] heads, warden, et[ ] al[.]" *Id.* at 67. On May 13, 2002, the AMF's Acting Warden, respondent David Bergh, denied Walton's Step II appeal, explaining that Walton had failed to present any new evidence and that the Step I response adequately addressed Walton's allegations. *Id.* at 68. Walton appealed to Step III. *Ibid.* In addition to restating his earlier allegations, he identified another white prisoner who was given a definite upper slot restriction assaulting a correctional officer. *Ibid.* Walton's Step III appeal was denied on the bases that "the responses provided at Step One and Step Two adequately address the merits of the main issue grieved" and that "[t]he evidence presented does not support the charges made by the Grievant." *Id.* at 69.

On August 12, 2002, Walton, filed a *pro se* § 1983 federal civil rights complaint against respondents Barbara Bouchard (AMF's Warden), Gearin, Bergh, Bauman, Gerth, and Bobo. JAI 123-36. Walton alleged that each

respondent "demonstrated [i]ntentional [a]nd [p]urposeful discrimination" and "[w]as [a]ware of the discrimination but [r]efused [t]o do [a]nything" in violation of the Equal Protection clauses of the Fifth and Fourteenth Amendments. *Id.* at 136.

In lieu of filing an answer, on January 13, 2003, respondents moved to dismiss the entirety of Walton's complaint. *Id.* at 158. On July 28, 2003, the magistrate to whom the case was referred recommended that respondents' motion be granted. See *id.* 158-64. The magistrate found that Walton exhausted his administrative remedies against only respondent Bobo because he "failed to mention the other named defendants in his grievances, even after the Step I response informed plaintiff that [another] defendant * * * was responsible for giving him the restriction." *Id.* at 159. Having found that Walton failed to exhaust his administrative remedies against the remaining defendants, the magistrate recommended that the entirety of Walton's complaint be dismissed under the "total exhaustion" rule. See *id.* at 159-63. Over Walton's objections, on October 14, 2003, the district court adopted the magistrate's report and recommendation in full and dismissed Walton's complaint. See *id.* at 165-66.

On June 17, 2002, the court of appeals affirmed the judgment of the district court with analysis that tracked the magistrate's report and recommendation and is indistinguishable from its analysis in petitioner Williams' case. See *id.* at 168-73. Relying on its prior decisions in *Curry* and *Burton*, the court of appeals held that Walton "named only [one defendant – respondent Bobo] in Step I of his grievance process, and under our precedent that is the only claim that we may consider exhausted." *Id.* at 172. Having thus found that Walton's claims against the remaining defendants were unexhausted, the court of appeals applied *Jones Bey*'s "total exhaustion" rule to

affirm the dismissal of Walton's entire complaint. *Ibid.* ("His claims as to all other defendants remain unexhausted and accordingly the district court properly dismissed the entire complaint under *Jones Bey*'s total exhaustion requirement.").

SUMMARY OF ARGUMENT

Applying three rules purportedly required by the PLRA's text, structure, and underlying purposes, the Sixth Circuit below affirmed the dismissal of petitioners' complaints notwithstanding that they each indisputably exhausted at least some of their claims. None of those rules are supported by the text, structure, or Congress' purposes in enacting the PLRA. By applying such judge-made embellishments to *pro se* prisoners, the court of appeals not only violated the "cardinal canon" of construction "that a legislature says in a statute what it means and means in a statute what it says," *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992), but ignored this Court's tradition of avoiding constructions of statutes that would "trap the unwary pro se prisoner." *Rose v. Lundy*, 455 U.S. 509, 520 (1982).

1. Contrary to the PLRA's text and structure and incompatible with the Federal Rules of Civil Procedure, the Sixth Circuit held that PLRA plaintiffs are required to document or, in the absence of documentation, plead with specificity how and when they exhausted their claims, lest their complaints be dismissed without leave to amend. Under the Federal Rules, non-exhaustion is an affirmative defense that this Court requires defendants to plead and prove. Congress could have required PLRA plaintiffs to plead exhaustion, but it decidedly did not. Although the PLRA provides that a district court "shall" dismiss an action that is "frivolous, malicious, [or] fails to state a claim," 42 U.S.C. 1997e(c)(1), Congress did not include

failure to exhaust among the grounds requiring mandatory dismissal. Had it done so, PLRA plaintiffs would have to plead exhaustion to avoid mandatory dismissal. But it did not. Within the same subsection, but in the following paragraph, Congress provided that a district court *may* dismiss unexhausted claims. 42 U.S.C. 1997e(c)(2). Reading § 1997e(c)(1)'s mandatory dismissal provision to include failure to exhaust would render § 1997e(c)(2)'s permissive dismissal provision superfluous and violate the *expressio unius* canon of statutory construction.

Even if PLRA plaintiffs were required to plead exhaustion to avoid mandatory dismissal, the Sixth Circuit's heightened pleading standard is indefensible. "Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions" enumerated in Rule 9. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 (2002). Exhaustion is not listed among Rule 9's exceptions, and although PLRA exhaustion is "mandatory," *Woodford v. Ngo*, 126 S.Ct. 2378, 2382 (2006), it is not a "condition precedent" under Rule 9(c). Equally misguided is the Sixth Circuit's "no amendment" rule, which cannot be reconciled with the Court's admonition that Rule 15(a)'s mandate that "leave [to amend] shall be freely given" "is to be heeded," *Foman v. Davis*, 371 U.S. 178, 182 (1962). Nor did the PLRA repeal by implication or impliedly supersede Rules 8 and 15 for purposes of the PLRA because the PLRA's screening provision, 28 U.S.C. 1915A, is not in "irreconcilable conflict" with, nor does it "cover[ ] the whole subject[s]" of pleading and amendment of pleadings, *Branch v. Smith*, 538 U.S. 254, 273 (2003).

2. Without any textual basis, contrary to established principles of administrative law and federal pleading procedure, and even though the MDOC's grievance procedure did not require it, the Sixth Circuit imposed a requirement that, for a prisoner to sue a

particular individual, that individual must have been identified in the prisoner's Step I grievance. By freezing the universe of potential defendants at the moment a prisoner files a Step I grievance, this "name all defendants" rule cannot be reconciled with the Federal Rules' policy of permissive joinder and liberal amendment. Without any textual indication that Congress intended such a result, this departure from established procedure is impermissible. Nor is the rule consistent with Congress' primary purpose in enacting the PLRA to provide prison officials notice of *problems* – not the identities of particular miscreants – in their prisons.

Additionally, the rule is inconsistent with this Court's decision in *Sims v. Apfel*, 530 U.S. 103 (2000). Prison grievance proceedings are necessarily informal and inquisitorial – not adversarial. *Sims* rejected an attempt, just like the Sixth Circuit's, to impose a technical exhaustion requirement on an informal and inquisitorial administrative process from which the requirement is absent from the process' own rules. Finally, the rule is incompatible with this Court's "proper exhaustion" framework, *Ngo*, 126 S.Ct. at 2382, under which a prisoner will be found to have exhausted his or her administrative remedies so long as he or she "us[es] all steps that the agency holds out, and do[es] so properly (so that the agency addresses the issues on the merits)." *Id.* at 2385. Petitioners filed grievances and appeals through all steps of the available process. No grievance was rejected on a procedural ground, and petitioners received decisions on the merits of their claims.

3. Equally unsupported is the Sixth Circuit's rule that properly exhausted claims must be dismissed whenever joined in the same complaint with one or more unexhausted claims. Section 1997e(a) states that "no action shall be brought * * * until such administrative remedies as are available are exhausted." Contrary to the Sixth Circuit's holding that Congress' use of the word "action"

requires dismissal of an entire mixed action, § 1997e(a) cannot be read in isolation. Congress' use of the word in other sections of the PLRA demonstrates that Congress intended mixed actions to be cured by dismissal of only the unexhausted claims.

Although the Sixth Circuit analogized its "total exhaustion" rule to the similarly named rule in habeas law, that judge-made habeas rule is inapplicable. The habeas "total exhaustion" rule was designed as a policy-based accommodation to federal-state comity concerns unique to habeas proceedings. There is no need to resort to policy to remedy a mixed PLRA complaint because the statute is clear. Moreover, the flexible rule in habeas, which does not *require* dismissal of an entire mixed habeas petition, is an unhelpful analogy because it does not resemble Sixth Circuit's inflexible rule, which requires dismissal of a prisoner's PLRA action in its entirety.

ARGUMENT

I. THE EXHAUSTION RULES USED BY THE SIXTH CIRCUIT TO JUSTIFY DISMISSAL OF PETITIONERS' COMPLAINTS VIOLATE THIS COURT'S PROHIBITION ON JUDICIAL SUPPLEMENTATION OF LEGISLATIVE ACTS AND ARE INCONSISTENT WITH THE LENIENCY THIS COURT AFFORDS *PRO SE* PRISONERS

These statutory interpretation cases are governed by the "cardinal canon" that presumes "that a legislature says in a statute what it means and means in a statute what it says," *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992), and the concomitant recognition that when a provision is not fairly contained in statutory language, the Court will not, in pursuit of the alleged policy of the statute, "engraft" it, even where the absent provision "undoubtedly would serve the Government's objectives,"

United States Dep't of Justice v. Landano, 508 U.S. 165, 181 (1993); see also *Dodd v. United States*, 125 S.Ct. 2478, 2483 (2005) (Court will not "rewrite the statute that Congress has enacted" despite the "potential for harsh results"); *Lamie v. United States Tr.*, 540 U.S. 526, 538 (2004) (Court will not "read an absent word into the statute"); *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) ("[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law."); *United States v. Goldenberg*, 168 U.S. 95, 103 (1897) ("No mere omission * * * which it may seem wise to have specifically provided for, justif[ies] any judicial addition to the language of the statute."). Consistent with these interpretive principles, this Court has warned previously against judicial invention of exhaustion requirements not mandated by Congress based on judicial views about policy questions. *Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496, 501, 514 (1982) (warning that resolving the inevitable subsidiary questions about the application of such a judge-made requirement "would create costly, remedy-delaying, and court-burdening litigation if answered incrementally by the judiciary in the context of diverse constitutional claims relating to thousands of different state agencies").

The plain text of the PLRA's exhaustion requirement states that "[n]o action shall be brought * * * until such administrative remedies as are available are exhausted." 42 U.S.C. 1997e(a). With this simple provision, Congress imposed a "mandatory exhaustion" requirement, *Porter v. Nussle*, 534 U.S. 516, 529 (2002), that "mean[s] what the term means in administrative law" and is "substantially

similar" to what the term means in "[t]he law of habeas corpus," *Woodford v. Ngo*, 126 S.Ct. 2378, 2386, 2387 (2006). Thus, as the Court explained in *Ngo*, "mandatory exhaustion" requires "proper exhaustion * * * which 'means using all steps that the agency holds out, and doing so properly (so that the agency addresses the issues on the merits).'" *Id.* at 2385 (quoting *Pozo v. McCaughtry*, 286 F.3d 1022, 1024 (CA7), cert. denied, 537 U.S. 949 (2002)).

None of the rules on which the court of appeals justified dismissal of petitioners' complaints are found in the PLRA – much less, in its exhaustion provision. "[U]sing all steps * * * and doing so properly" is *all* that the PLRA's exhaustion provision requires of a prisoner, and is precisely what petitioners did in the administrative proceedings underlying these cases: Petitioners filed grievances, appealed the denials of those grievances through all levels of the MDOC's grievance system without having any submissions rejected on procedural grounds, and received final administrative decisions on the merits. Nonetheless, in each case, the court of appeals essentially held that dismissal was required not because a provision of the PLRA expressly commanded it, but instead for reasons believed by the court to vindicate or effectuate the PLRA's exhaustion requirement. Indeed, even some of the courts espousing the rules used to justify the dismissal of petitioners' complaints acknowledge the absence of express statutory authority for their rules. See, e.g., *Ross v. County of Bernalillo*, 365 F.3d 1181, 1190 (CA10 2004) (acknowledging that the PLRA only "suggests" a "total exhaustion" rule); *Steele v. Federal Bureau of Prisons*, 355 F.3d 1204, 1207 (CA10 2003), cert. denied, 125 S.Ct. 344 (2004) (acknowledging that the PLRA does not "directly address[]" the parties' respective pleading burdens); cf. *Curry v. Scott*, 249 F.3d 493, 505 (CA6 2001) (offering no textual support for its "name all defendants" rule). Absent

statutory command, these judge-made and policy-based attempts to rewrite the PLRA cannot be squared with this Court's steadfast prohibition on judicial supplementation of legislative acts.

Moreover, these three consolidated cases are particularly inappropriate candidates for the Court to depart from this well-settled prohibition because of the Court's traditional leniency toward *pro se* litigants generally and *pro se* prisoners specifically. This Court has long held that construction of a statute that imposes "technicalities" or encourages a litigant's claims to be forfeited through procedural errors is "particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers initiate the process." *Love v. Pullman*, 404 U.S. 522, 526 (1972); see also *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 115 (2002) (construing statute to ensure that "the lay complainant * * * will not risk forfeiting his rights inadvertently"); *Mohasco Corp. v. Silver*, 447 U.S. 807, 816 n.19 (1980) (court should not "read in a time limitation provision that Congress has not seen fit to include" in statutory scheme in which "laymen * * * initiate the process."). Ninety-six percent of prison civil rights cases are prosecuted by prisoners *pro se*. Roger A. Hanson & Henry W.K. Daley, U.S. Dep't of Justice, Bureau of Justice Statistics, *Challenging the Conditions of Prisons & Jails: A Report on Section 1983 Litigation* 21, 22 (Dec. 1994), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ccopaj.pdf. A likely greater percentage prosecute administrative grievances without counsel because, even with a civil rights attorney to prosecute the dispute in court, many prison grievance systems prohibit lawyers from participating in their grievance processes. See, e.g., U.S. Dep't of Justice, Bureau of Prisons, Program Statement on Administrative Remedy Program, Directive No. 1330.13, § 540.16 (Aug. 13, 2002), *available at* http://www.bop.gov/policy/

progstat/1330_013.pdf (explaining that, although an inmate may obtain assistance from outside sources, including attorneys, "no person may submit a Request or Appeal on the inmate's behalf," and seeking outside assistance will not justify a filing delay).

The Court has been equally – if not more – lenient when the *pro se* litigant is a prisoner for at least two reasons. First, "[t]he right to file for legal redress in the courts" is "more valuable" for prisoners. *Hudson v. McMillian*, 503 U.S. 1, 15 (1992) (Blackmun, J., concurring). Having been "divested of the franchise, the right to file a court action stands, in the words of *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), as [a prisoner's] most 'fundamental political right, because preservative of all rights.'" *Ibid.*; see also *McCarthy v. Madigan*, 503 U.S. 140, 153 (1992) ("[F]ederal courts must take cognizance of the valid constitutional claims of prison inmates." (quoting *Turner v. Safley*, 482 U.S. 78, 84 (1987))). That right guarantees prisoners that they will not be prevented arbitrarily from litigating a federal action, *Ex parte Hull*, 312 U.S. 546, 549 (1941), and, further, that they will have "a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts," *Bounds v. Smith*, 430 U.S. 817, 825 (1977); see also *Lewis v. Casey*, 518 U.S. 343, 351 (1996) ("[M]eaningful access to the courts is the touchstone.").

Additionally, prisoners are often uneducated, unsophisticated, and legally inexperienced, thereby placing them at a significant competitive disadvantage vis-à-vis the educated, trained, and repeat-player prison officials they confront at the administrative level and the government lawyers they face in court. John Boston, *The Prison Litigation Reform Act: The New Face of Court Stripping*, 67 Brook. L. Rev. 429, 431 (2001); see also Caroline Wolf Harlow, U.S. Dep't of Justice, Bureau of Justice Statistics,

Education and Correctional Populations 1 (Jan. 2003), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ecp.pdf (reporting that over 41% of inmates in the Nation's State and Federal prisons and local jails have failed to complete high school or its equivalent); Karl O. Haigler et al., U.S. Dep't of Education Office of Education and Research, *Literacy Behind Prison Walls: Profiles of the Adult Prison Population from the National Adult Literacy Survey* xviii (Oct. 1994), *available at* http://nces.ed.gov/pubs94/94102.pdf (reporting that seven out of ten U.S. inmates operate at the two lowest levels of literacy on a five-level scale). Accordingly, the Court has been careful to construe statutes so as "not to 'trap the unwary pro se prisoner,'" *Slack v. McDaniel*, 529 U.S. 473, 487 (2000) (quoting *Rose v. Lundy*, 455 U.S. 509, 520 (1982)), and to hold "prisoner complaints * * * 'to less stringent standards than formal pleadings drafted by lawyers,'" *Hughes v. Rowe*, 449 U.S. 5, 9-10 (1980) (quoting *Haines v. Kerner*, 404 U.S. 519, 520 (1972)). The Sixth Circuit's rules at issue in these cases ignore these long-standing policies.

II. THE SIXTH CIRCUIT'S JUDICIALLY-CREATED HEIGHTENED PLEADING REQUIREMENT IS INCONSISTENT WITH THE PLRA'S TEXT AND STRUCTURE AND CONTRAVENES THE FEDERAL RULES OF CIVIL PROCEDURE

A. Non-Exhaustion Is an Affirmative Defense that the Federal Rules of Civil Procedure Require Defendants to Plead and Prove

The Federal Rules of Civil Procedure "govern the procedure in the United States district courts in all suits of a civil nature," Fed. R. Civ. P. 1, subject to certain limitations enumerated in Rule 81, Fed. R. Civ. P. 1 advisory committee's note 1 ("Rule 81 states certain

limitations in the application of these rules to enumerated special proceedings."). Rule 81, however, does not exempt PLRA suits from application of the Federal Rules. Accordingly, the Federal Rules apply.

Under the Federal Rules, "[n]o technical forms of pleading * * * are required," R. 8(e)(1), and "[a]ll pleadings shall be so construed as to do substantial justice," R. 8(f). Rule 8(a) requires only that a plaintiff plead: (1) "the grounds upon which the court's jurisdiction depends," (2) "a short plain statement of the claim showing that the pleader is entitled to relief," and (3) "a demand for judgment." Fed. R. Civ. P. 8(a). As this Court has long recognized, Rule 8(a)'s "short plain statement" requirement is designed "simply [to] 'give the defendant fair notice of what the plaintiff's claim is and the grounds on which it rests.'" *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

Rule 9 addresses "Pleading Special Matters" but administrative exhaustion – much less, PLRA exhaustion – is not listed among them. See Fed. R. Civ. P. 9 (describing pleading requirements for (a) capacity; (b) fraud, mistake, or condition of the mind; (c) conditions precedent; (d) official document or act; (e) judgment; (f) time and place; (g) special damage; and (h) admiralty and maritime claims). In *Brown v. Toombs*, 139 F.3d 1102, 1104 (CA6), cert. denied, 525 U.S. 833 (1998), the Sixth Circuit characterized PLRA exhaustion as a "condition precedent" to suit within the meaning of Rule 9(c). But Rule 9(c) simply has no application here; it does not require a plaintiff to plead exhaustion in any type of suit – much less, a PLRA suit. Rule 9(c) provides: "In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions have been performed or have

occurred."[11] As the leading federal practice treatise observes, "By its terms the * * * rule applies only to conditions 'precedent,' not to the performance of procedural or administrative requirements for filing the claim or to the anticipation of possible defenses." 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil* § 1303 (2006).

Even if exhaustion was a condition precedent, Rule 9(c) would not require that it be pleaded because the rule does not require conditions precedent to be pleaded. 2 James Wm. Moore, *Moore's Federal Practice*, § 9.04[1] (3d ed. 1997) ("Neither Rule 9(c) nor Rule 8(a)(2) expressly requires that the performance or occurrence of conditions precedent be pled at all by a claimant."). Rather, it merely sets forth the manner in which such allegations, if required for some other independent reason, must be pleaded. E.g., *Kiernan v. Zurich Cos.*, 150 F.3d 1120, 1124 (CA9 1998). Because exhaustion is not listed among the matters that Rules 8(a) or 9 require a plaintiff to plead, and because non-exhaustion is plainly a defense to any claim requiring that administrative or state remedies first be exhausted, the burden of pleading it plainly falls on defendants. See Fed. R. Civ. P. 8(c) (requiring a defendant to "set forth affirmatively" "any other matter constituting an * * * affirmative defense").

Accordingly, it is no surprise that this Court has consistently characterized exhaustion as an affirmative defense in the administrative law context.[12] See *Felder v.*

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[11] The Rule requires that "[a] *denial* of performance or occurrence shall be made specifically and with particularity." Fed. R. Civ. P. 9(c) (emphasis added).

[12] Similarly, to the extent that this Court's habeas jurisprudence is relevant here (see *infra* Part IV(B)), this Court has consistently characterized exhaustion as an affirmative defense in the habeas

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Casey, 487 U.S. 131, 157 (1988) (construing "Wisconsin's notice of claim statute, which imposes a limited exhaustion of remedies requirement on those with claims against municipal governments and their officials" as "a special affirmative defense in litigation"); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) ("hold[ing] that filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling.").[13] Nor is

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context. See *Day v. McDonough*, 126 S.Ct. 1675, 1678, 1682 (2006) (describing "exhaustion of state remedies" in the habeas context as an affirmative defense and likening it to "the statute of limitations defense"); *Granberry v. Greer*, 481 U.S. 129, 132 n.5 (1987) ("[T]he answer to a habeas petition shall state whether the petitioner has exhausted his state remedies including any post-conviction remedies available to him under the statutes or procedural rules of the state." (quotation omitted)).

[13] The courts of appeals have repeatedly held in numerous other contexts that exhaustion is an affirmative defense.

- ADEA: *Belgrave v. Pena*, 254 F.3d 384, 386-87 (CA2 2001); *Daugherity v. Traylor Bros., Inc.*, 970 F.2d 348, 352 (CA7 1992)
- ERISA: *Paese v. Hartford Life Accident Ins. Co.*, 449 F.3d 435, 446 (CA2 2006); *Bourgeois v. Pension Plan for Employees of Santa Fe Intern. Corps.*, 215 F.3d 475, 479 (CA5 2000)
- IDEA: *Mosely v. Bd. of Educ.*, 434 F.3d 527, 532-33 (CA7 2006)
- LMRA: *Walk v. P*I*E Nationwide, Inc.*, 958 F.2d 1323, 1330 (CA6 1992); *Sellers v. M.C. Floor Crafters, Inc.*, 842 F.2d 639, 642 n.2 (CA2 1988)
- Title VII: *Downey v. Runyon*, 160 F.3d 139, 146 (CA2 1998); *Williams v. Runyon*, 130 F.3d 568, 573 (CA3 1997); *Bowden v. United States*, 106 F.3d 433, 437 (CADC 1997); *Brown v. Marsh*, 777 F.2d 8, 13 (CADC 1985)
- TVPA: *Jean v. Dorelien*, 431 F.3d 776, 781 (CA11 2005)

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it any surprise that the overwhelming majority of the circuits have held that PLRA exhaustion is an affirmative defense to be pleaded and proven by the defense.[14]

B. The PLRA's Text and Structure Demonstrate that Congress Carefully Declined to Make PLRA Exhaustion an Element of a Prisoner's § 1983 Claim or to Require a Prisoner to Plead It

In holding that a PLRA plaintiff is required to plead exhaustion, the Sixth and Tenth Circuits have emphasized Congress' decision to make exhaustion mandatory rather than discretionary and to use the imperative language "no action shall be brought * * * until such administrative remedies as are available are exhausted" in § 1997e(a). See *Steele*, 355 F.3d at 1209; *Brown*, 139 F.3d at 1104. But these courts have failed to explain how this language imposes a mandatory burden of pleading exhaustion on

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Of course, exhaustion need not always be an affirmative defense. "Legislatures know how to indicate that exhaustion is a pleading requirement when they want to." *Wyatt v. Terhune*, 315 F.3d 1108, 1118 (CA9), cert. denied, 540 U.S. 810 (2003) (citing *Walton v. Nalco Chemical Co.*, 272 F.3d 13 (CA1 2001)). Critically, however, there is no indication in the PLRA or its legislative history that Congress intended PLRA exhaustion to be.

[14] Compare *Casanova v. Dubois*, 304 F.3d 75, 77 (CA1 2002) (affirmative defense); *Jenkins v. Haubert*, 179 F.3d 19, 28-29 (CA2 1999) (same); *Ray v. Kertes*, 285 F.3d 287, 295 (CA3 2002) (same); *Anderson v. XYZ Corr. Health Servs., Inc.*, 407 F.3d 674, 681 (CA4 2005) (same); *Massey v. Helman*, 196 F.3d 727, 735 (CA7 2000), cert. denied, 532 U.S. 1065 (2001) (same); *Foulk v. Charrier*, 262 F.3d 687, 697 (CA8 2001) (same); *Wyatt*, 315 F.3d at 1119 (CA9 – same); and *Jackson v. District of Columbia*, 254 F.3d 262, 267 (CADC 2001) (*Jackson II*) (same), with *Brown*, 139 F.3d at 1104 (CA6 – pleading requirement); *Steele*, 355 F.3d at 1209-10 (CA10 – same); and *Rivera v. Allin*, 144 F.3d 719, 731 (CA 11), cert. dismissed, 524 U.S. 978 (1998) (same).

prisoners. Indeed, the Tenth Circuit has acknowledged that the PLRA does not "directly address[ ]" the parties' respective pleading burdens. *Steele*, 355 F.3d at 1207.

All affirmative defenses are "mandatory" insofar as the plaintiff cannot prevail if the defendant establishes them. Exhaustion is no different from statutes of limitations, which "equally imperative," also require a plaintiff to satisfy a condition (timely filing) before prevailing on the merits of his or her suit. *Wyatt*, 315 F.3d at 1118 (quoting *Jackson v. District of Columbia*, 89 F.Supp.2d 48, 56 (D.D.C. 2000) (*Jackson I*), vacated and remanded on other grounds, 254 F.3d 262 (CADC 2001). Yet the burden to plead and prove the failure to satisfy a limitation period unilaterally is placed on the defendant. Fed. R. Civ. P. 8(c); see also *Perez v. Wisconsin Dep't of Corr.*, 182 F.3d 532, 536 (CA7 1999) (likening exhaustion under PLRA to statute of limitations).

The Tenth Circuit concluded that it would "trivializ[e]" the exhaustion requirement to classify it as an affirmative defense. *Steele*, 355 F.3d at 1209. But this reasoning is even more flimsy than the Sixth and Tenth Circuits' prior justification. There are many affirmative defenses that this Court has recognized as far from trivial. For example, despite the many important policies underlying qualified immunity, see *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (stressing the importance of preventing frivolous suits against government officials, which may dampen the ardor with which they carry out their jobs), the Court has never wavered from its conclusion that the burden of pleading qualified immunity rests exclusively with the defendant, see *Gomez v. Toledo*, 446 U.S. 635, 640 (1980) (holding that qualified immunity is one of Rule 8(c)'s "any other matter[s] constituting an avoidance or affirmative defense").

The Sixth, Tenth, and Eleventh Circuits have also held that a PLRA "complaint 'that fails to allege the requisite exhaustion of remedies is tantamount to one that fails to state a claim upon which relief may be granted,'" thereby rendering exhaustion a prerequisite to suit that PLRA plaintiffs must allege in their complaints. *Steele*, 355 F.3d at 1210 (quoting *Rivera*, 144 F.3d at 731); see also *Baxter v. Rose*, 305 F.3d 486, 489 (CA6 2002) ("A plaintiff who fails to allege exhaustion of administrative remedies through 'particularized averments' does not state a claim on which relief may be granted, and his complaint must be dismissed."). Not only is the suggestion that failing to allege exhaustion is "tantamount to one that fails to state a claim" precisely the kind of judicial gloss that this Court forbids, see *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998) ("[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."); *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 495 n.13 (1985) ("[C]ongressional silence, no matter how 'clanging,' cannot override the words of the statute."), it also ignores that exhaustion is not an element of a § 1983 claim. The elements of a § 1983 claim are not mysterious; "to state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988) (citing *Parratt v. Taylor*, 451 U.S. 527, 535 (1981); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155 (1978)); accord, *Gomez*, 446 U.S. at 640.

This is not to suggest that Congress was powerless to make exhaustion an element of a prisoner's § 1983 claims. A straightforward reading of the PLRA's text and

structure, however, reveals that Congress carefully declined to do so.[15] E.g., *Anderson*, 407 F.3d at 681 ("If Congress had been less precise when drafting the PLRA, then perhaps the argument [that exhaustion must be pleaded] would be more persuasive.").

First, the interplay between § 1997e(c)(1) and (2) would make little sense if failure to state a claim included failure to exhaust. Paragraph (1) states that a district court "shall" dismiss actions that are "frivolous, malicious, [or] fail[] to state a claim upon which relief can be granted." These grounds for dismissal necessarily go to the *merits* of a claim as pleaded by the prisoner plaintiff. Nowhere does paragraph (1) indicate that district courts are commanded to dismiss for failure to exhaust administrative remedies. Paragraph (2) states that courts "may" dismiss claims on the same listed bases but adds that a court may do so "without first requiring the exhaustion of administrative remedies." "If failure to state a claim included failure to exhaust for purposes of Section 1997e(c), then paragraph (2) would carry the highly improbable meaning that courts may dismiss for failure to exhaust administrative remedies without first requiring exhaustion of administrative remedies." *Snider v. Melindez*, 199 F.3d 108, 111 (CA2 1999). Furthermore, paragraph (2) would direct courts that they "may" do what paragraph (1) asserts they "shall" do. E.g., *Ray*, 285 F.3d at 296 n.9 ("Any argument that Congress intended the broad categories in Section 1997e(c)(1) to include dismissal for failure to

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[15] Nor is PLRA exhaustion a jurisdictional requirement that a prisoner must plead under Rule 8(a). Prior to *Ngo*, every court of appeals had held that PLRA exhaustion is not jurisdictional, see *Steele*, 355 F.3d at 1208 (collecting cases and noting "numerous reasons for the circuit courts' unanimity"), and in *Ngo* this Court made clear that it is not. 126 S.Ct. at 2392.

exhaust is *demolished* by Section 1997e(c)(2)." (quoting *Jackson I*, 89 F.Supp.2d at 57) (emphasis added)).

Second, this reading, by rendering § 1997e(a) redundant, would also violate "[t]he rule against superfluities," *Hibbs v. Winn*, 542 U.S. 88, 101 (2004), which requires that "[a] statute * * * be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant," Norman J. Singer, *Sutherland Statutes & Statutory Construction* § 46.06, at 181-186 (rev. 6th ed. 2000); see also *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (disapproving statutory interpretations that render provisions superfluous). There would simply be no need to provide that prisoner actions may not be brought until administrative remedies are exhausted, as § 1997e(a) provides, if § 1997e(c)(1) mandated dismissal for failure to exhaust administrative remedies.

Finally, this reading would violate the *expressio unius est exclusio alterius* statutory-construction canon. See *Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quotation omitted)); accord, *Bates v. United States*, 522 U.S. 23, 29-30 (1997) (same); 2A Singer, *supra* § 47.25, at 327 ("There is generally an inference that omissions are intentional. This rule is based on logic and common sense. It expresses the concept that when people say one thing they do not mean something else."). The PLRA's exhaustion requirement is contained in the same statutory section, § 1997e(a), and just a few printed lines before § 1997e(c)(1)'s list of grounds for dismissal. Under these circumstances, the absence of failure-to-exhaust as grounds for dismissal in § 1997e(c) must be viewed as an intentional congressional omission. E.g., *Anderson*, 407

F.3d at 680; see also *id.* at 681 ("It * * * is not for us to read failure-to-exhaust into § 1997e(c)(2)."); *Ray*, 285 F.3d 296 ("Congress had not forgotten about the need for exhaustion, but chose not to include failure to exhaust among the grounds for which the court could dismiss *sua sponte*. * * * [T]he inference is inescapable that Congress did not intend to include failure to exhaust among the categories justifying *sua sponte* dismissal.").

C. Even if PLRA Plaintiffs Are Required to Plead Exhaustion, the Heightened Pleading Rule Imposed by the Sixth Circuit Cannot Be Squared with the Federal Rules of Civil Procedure and this Court's Precedents Interpreting Them

Federal Rule of Civil Procedure 8(a)'s liberal notice pleading requirement simply requires that a plaintiff plead "a short plain statement" of "the grounds on which jurisdiction depends" and a "statement of the claim showing that the pleader is entitled to relief." This Court has held that this liberal notice pleading standard applies to *all* civil cases unless the Federal Rules or an act of Congress expressly provide otherwise. In *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), and *Swierkiewicz*, the Court prohibited federal courts from imposing pleading standards that are not explicitly authorized by the Federal Rules. See also *Conley*, 355 U.S. at 47 (a plaintiff need not set out his claim in detail unless Federal Rules require it). With respect to actions governed by the PLRA, neither the Federal Rules nor the PLRA imposes *any* pleading requirement beyond the basics prescribed by Rule 8(a), see *supra* Part II(A) – much less, the heightened pleading standard adopted by the Sixth and Tenth Circuits. By requiring PLRA plaintiffs to satisfy a heightened pleading

standard notwithstanding the lack of statutory authority, the Sixth and Tenth Circuits have disregarded this Court's clear precedent.

In *Leatherman*, the Court reversed the Fifth Circuit's imposition of a more demanding pleading standard in actions alleging municipal liability under 42 U.S.C. 1983. 507 U.S. at 167. The Court explained that while "the Federal Rules do address in Rule 9(b) the question of the need for greater particularity in pleading certain actions, [they] do not include among the enumerated actions any reference to complaints alleging municipal liability under § 1983." *Id.* at 168. As a result, this Court unanimously held that Rule 8(a)'s notice pleading standard alone governs such complaints and vacated the Fifth Circuit's decision. *Ibid.*

The Court reiterated this rule in *Swierkiewicz*, in which it also rejected a heightened pleading requirement for employment discrimination complaints brought under Title VII. 534 U.S. at 508. The Second Circuit (5 Fed. Appx. 63, 65 (CA2 2001)) had held that those complaints must contain specific facts establishing a *prima facie* case of discrimination under the framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). This Court reversed the Second Circuit's decision, in part because the judicially-created heightened pleading standard conflicted with Rule 8(a). 534 U.S. at 512. Referring to *Leatherman*, a unanimous Court held:

> Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions. Rule 9(b), for example, provides for greater particularity in all averments of fraud or mistake. This Court, however, has declined to extend such exceptions to other contexts. * * * Just as Rule 9(b) makes no mention of municipal liability under

> * * * 42 U.S.C. § 1983, neither does it refer to employment discrimination. Thus, complaints in these cases, as in most others, must satisfy only the simple requirements of Rule 8(a).

Id. at 513 (footnotes omitted). The Court concluded that "[a] requirement of greater specificity for particular claims is a result that 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'" *Id.* at 515 (quoting *Leatherman*, 507 U.S. at 168).

Just as Rule 9(b) does not mention municipal liability actions under § 1983 (*Leatherman*) or employment discrimination actions (*Swierkiewicz*), it does not mention PLRA actions.[16] But despite this Court's clear holdings, the Sixth and Tenth Circuits have imposed a heightened pleading standard in PLRA actions that conflicts directly with this Court's decisions in *Leatherman* and *Swierkiewicz*.[17]

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[16] As noted earlier, *supra* Part II(A), Rule 9(c) does not require exhaustion to be pleaded. Even if it did, however, it would not sanction the Sixth and Tenth Circuit's heightened pleading rule. See Wright & Miller, *supra*, § 1302 (noting that Rule 9(c)'s purpose was "to *eliminate* the detailed and largely unnecessary averments that resulted under the common law procedure, and to prevent nonmeritorious dismissals for a failure to plead the fulfillment of conditions precedent that are not at issue in the suit or simply are overlooked accidentally by the pleader." (emphasis added)).

[17] At the petition-stage, respondents attempted to distinguish *Swierkiewicz* on the basis that it was an employment discrimination case in which the court of appeals required the plaintiff to plead facts establishing a prima facie case of discrimination under the *McDonnell Douglas*, framework. 05-7058 BIO at 6. Respondents argued that, unlike the *McDonnell Douglas* framework, the PLRA requires prisoner plaintiffs to plead exhaustion. *Id.* at 6-7. This attempt to distinguish *Swierkiewicz* founders on its premise, as it improperly assumes that the PLRA requires prisoner plaintiffs to plead exhaustion in the first place. See *supra* Parts II(A), (B).

The Sixth and Tenth Circuits' attempts to distinguish *Swierkiewicz* are unpersuasive. Both courts have asserted that their adopted pleading standard "do[es] not amount to a judicially-created heightened pleading requirement," *Steele*, 355 F.3d at 1210; see also *Baxter*, 305 F.3d at 490, and "'does not take its authority from the Federal Rules of Civil Procedure, but from the Prison Litigation Reform Act,'" *Steele*, 355 F.3d at 1211 (quoting *Baxter*, 305 F.3d at 490); see also *Knuckles-El v. Toombs*, 215 F.3d 640, 642 (CA6), cert. denied, 531 U.S. 1040 (2000) (asserting that a heightened pleading standard is necessary to "effectuate" the PLRA's exhaustion requirement). Congress, however, has not imposed any such pleading requirement. Instead, Congress has simply imposed an exhaustion requirement. The Sixth and Tenth Circuit's imposition of an extra-statutory heightened pleading requirement that they believe somehow advances the PLRA's purpose cannot be tolerated, lest there be no limits to the judicial gloss that courts could impose on a statute. See *Crawford El v. Britton*, 523 U.S. 574, 585, 594 (1998) (holding that a prisoner should not be subjected to heightened pleading and proof standards in a case involving the defendants' intent because it "would stray far from the traditional limits on judicial authority" to change standards of pleading and proof on the basis of policy concerns alone).

D. The Sixth Circuit's Heightened Pleading Rule Is Exacerbated by Its Equally Unauthorized Rule Forbidding Amendments of Complaints to Cure Any Deficiencies in Pleading Exhaustion

Under the Federal Rules, "[a] party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served. * * * Otherwise a party may amend the party's pleading only by leave of

court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). "Perhaps the most common use of Rule 15(a) is by a party seeking to amend in order to cure a defective pleading." 6 Wright & Miller, *supra*, § 1474. In *Foman v. Davis*, 371 U.S. 178, 182 (1962), this Court explained that Rule 15(a)'s "leave shall be freely given" "mandate is to be heeded." "[O]utright refusal to grant the leave without any justifying reason appearing for the denial * * * is [an] abuse of * * * discretion and inconsistent with the spirit of the Federal Rules." *Ibid.*

Yet, the Sixth Circuit's blanket rule barring amendment whenever a prisoner "fails to make a sufficient allegation of exhaustion in their initial complaint,"[13] *Baxter*, 305 F.3d at 489, is precisely the sort of "outright refusal * * * without any justifying reason" that *Foman* forbids, 371 U.S. at 182. *Baxter*'s only justification for its rule was a brief discussion of its prior decision in *McGore v. Wrigglesworth*, 114 F.3d 601 (CA6 1997). *Baxter*, 305 F.3d at 489 & n.3. In *McGore*, the Sixth Circuit relied on the "shall dismiss" language in the PLRA's screening

[13] Although no other court of appeals has specifically addressed whether dismissal for failure to sufficiently plead exhaustion requires leave to amend, every court of appeals to consider dismissal under various other PLRA dismissal provisions has held that leave to amend is required. See *Cruz v. Gomez*, 202 F.3d 593, 597-98 (CA2 2000); *Grayson v. Mayview State Hosp.*, 293 F.3d 103, 109-14 (CA3 2002); *Bazrowx v. Scott*, 136 F.3d 1053, 1054 (CA5 1998); *Lopez v. Smith*, 203 F.3d 1122, 1127 (CA9 2000) (en banc); *Perkins v. Kansas Dept. of Corrections*, 165 F.3d 803, 806 (CA10 1999); *Brown v. Johnson*, 387 F.3d 1344, 1348-49 (CA11 2004); *Davis v. Dist. of Columbia*, 158 F.3d 1342, 1349 (CADC 1998). The fact that no other court of appeals has addressed whether dismissal for failure to sufficiently plead exhaustion requires leave to amend is not surprising, given that the Sixth Circuit is one of only three circuits to require a PLRA plaintiff to plead exhaustion in the first place. See *supra* note 14.

provisions, 28 U.S.C. 1915(e)(2) and 1915A, to hold that prisoners may not amend their complaints to cure pleading defects. 114 F.3d at 612 ("Under the Prison Litigation Reform Act, courts have no discretion in permitting a plaintiff to amend a complaint to avoid sua sponte dismissal."). But like *Baxter*, *McGore* provides no reasoning for its holding; it appears that the Sixth Circuit simply assumed that the authority to dismiss a complaint *sua sponte* carries with it a prohibition on allowing a plaintiff to fix defects.

That the Sixth Circuit has not attempted to explain the basis for its rule is not surprising; the rule is indefensible. As discussed above, Congress carefully declined to include failure to plead exhaustion among § 1997e(c)'s grounds for dismissal. See *supra* Part II(B). Sections 1915(e)(2)'s, 1915A's, and 1997e(c)'s dismissal provisions are meaningfully indistinguishable except that § 1915(e)(2) additionally allows *sua sponte* dismissal if an *in forma pauperis* plaintiff's "allegation of poverty is untrue" and § 1915A contains a timing requirement that district courts screen PLRA complaints "before docketing, if feasible or, in any event, as soon as practicable after docketing." Accordingly, there is nothing in either § 1915(e)(2) or § 1915A that, unlike § 1997e(c), would support *McGore*'s unexplained reliance on them to justify a blanket "no amendment" rule.[19]

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[19] The sparse legislative history regarding the PLRA's screening provisions confirms that Congress did not intend to make failure to exhaust one of the grounds on which a complaint may be dismissed under any of the PLRA's screening provisions. The only references to the PLRA's dismissal provisions in the statute's entire legislative history are two floor statements by Senator Dole, one floor statement by Representative Canady, and three statements in a House Judiciary Committee report on H.R. 667, 104th Cong. (1995), Titles II and III of which, with some modifications not germane here, became the PLRA. *None* of these statements indicate that any involved member of Congress understood failure to exhaust to be among the grounds on

(Continued on following page)

But even if Congress intended to treat failure to plead exhaustion as a ground for dismissal by construing it as failure to state a claim, nothing in the PLRA's dismissal provisions would deprive district courts of their traditional discretion to grant leave to amend following dismissal for failure to state a claim. The language of each of the PLRA's dismissal provisions as they apply to failures to state a claim mirrors Federal Rule of Civil Procedure 12(b)(6)'s language.[20] And in dismissing a complaint under Rule 12(b)(6), the long-standing federal tradition has been to grant leave to amend unless it is *certain* from the complaint that amendment would be futile. 5B Wright & Miller, *supra*, § 1357 ("[T]he district court normally will give the plaintiff leave to file an amended complaint to see if the shortcomings of the original document can be corrected. This is true even when the district judge doubts that the plaintiff will be able to overcome the shortcomings in the initial pleading. * * * [L]eave to amend the complaint

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which a district court may dismiss a complaint at the screening stage. See H.R. Rep. No. 104-21, at 7 (1995) ("[I]t requires the court to dismiss any prisoner suit if it fails to state a claim of a violation for which relief can be granted, or if the suit is frivolous or malicious."); *id.* at 22 (similar); *id.* at 32 (similar); 141 Cong. Rec. H14106 (daily ed. Dec. 6, 1995) (statement of Rep. Canady) ("Title VIII will require a Federal court to dismiss, on its own motion, lawsuits which do not state a claim upon which relief may be granted or are frivolous or malicious."); 141 Cong. Rec. S14414 (daily ed. Sep. 27, 1995) (statement of Senator Dole) ("Another provision of the Prison Litigation Reform Act would require judicial screening, before docketing, of any civil complaint filed by a prisoner seeking relief from the Government [and] would allow a Federal judge to immediately dismiss a complaint if either of two conditions is met: First, the complaint does not state a claim upon which relief may be granted, or second, the defendant is immune from suit."); 141 Cong. Rec. S7525 (daily ed. May 25, 1995) (statement of Senator Dole) (similar).

[20] Compare 28 U.S.C. 1915(e)(2)(B)(ii), 1915(g), 1915A(b)(1), and 42 U.S.C. 1997e(c)(1) and (2), with Fed. R. Civ. P. 12(b)(6).

should be refused only if it appears to a certainty that the plaintiff cannot state a claim."). Absent any evidence of congressional intent to do so, it "[can]not lightly to be assumed that Congress intended to depart from [this] long established policy." *Robertson v. Railroad Labor Bd.*, 268 U.S. 619, 627 (1925).

Moreover, the Sixth Circuit's "no amendment" rule contravenes the policies that underlie Rule 15(a). This Court requires a sufficient basis for denial of leave to amend because the purpose of pleading under the Federal Rules of Civil Procedure is "to facilitate a proper decision on the merits," not to set the stage for "a game of skill in which one misstep by counsel may be decisive to the outcome." *Foman*, 371 U.S. at 181-82. Yet subjecting petitioner Jones, a *pro se* prisoner, to a game of skill is precisely what the court of appeals did here by refusing leave to amend notwithstanding that proof that he exhausted his claims against at least respondents Morrison and Opanasenko was present in the record by the time his case was referred to the magistrate judge for evaluation. JAI 33-38.

E. Congress Did Not Repeal by Implication or Impliedly Supersede Federal Rules of Civil Procedure 8 and 15 with Respect to PLRA Complaints

In *Baxter*, the Sixth Circuit further asserted that its heightened pleading standard is authorized by the PLRA's screening provision codified at 28 U.S.C. 1915A and that requiring prisoners to plead exhaustion with specificity will prevent them from manipulating liberal pleading standards to avoid early dismissal of their unexhausted

claims.[21] *Baxter*, 305 F.3d at 490 ("Courts would be unable to screen cases effectively if plaintiffs were able, through ambiguous pleading, to avoid dismissal of claims on which relief could not be granted."). Critically, however § 1915A changes nothing but the *timing* for evaluating a prisoner's complaint. Nothing in § 1915A purports to change what a prisoner must *allege* to survive that evaluation.

Nonetheless, at the petition-stage, respondents seized on the Sixth Circuit's assertions and boldly argued that § 1915A conflicts with and, therefore, impliedly repealed and supersedes Federal Rules of Civil Procedure 8 and 15 with respect to PLRA complaints.[22] 05-7058 BIO at 2-8. In doing so, they recognized – as they must – that "[i]t is * * * a cardinal rule of statutory construction that repeals by implication are not favored * * * [and that] the intention of the legislature to repeal must be clear and manifest." *Id.* at 4-5 (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S.

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[21] If the justification for imposing a heightened pleading requirement is simply to facilitate § 1915A screening, then there is no principled reason for limiting this requirement to exhaustion. Under the Sixth Circuit's faulty logic, prisoners would have the burden to anticipate *all* possible affirmative defenses to their claims and be required to plead *all* allegations with particularity. It is no surprise that no court has embraced such a view.

[22] To our knowledge, no court has been so bold as to embrace this repeal by implication argument, and for good reason. Respondents' argument is of the same ilk as the argument that the Court rejected in *Swierkewicz*. See 534 U.S. at 514-15 ("Respondent argues that allowing lawsuits based on conclusory allegations of discrimination to go forward will burden the courts and encourage disgruntled employees to bring unsubstantiated suits. * * * Whatever the practical merits of this argument, * * * [a] requirement of greater specificity for particular claims is a result that 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'" (citation omitted)).

Nor has any court complained that it cannot screen cases effectively under the standards of Rules 8 and 15, notwithstanding that courts have had ten years since the PLRA's enactment to do so.

148, 154 (1976)); see also *United States v. Welden*, 377 U.S. 95, 102 n.12 (1964). The requirement that intent to repeal must be clear and manifest makes sense because "Congress understands the state of existing law when it legislates," *Bowen v. Massachusetts*, 487 U.S. 879, 896 (1988), and "[i]t is not lightly to be assumed that Congress intended to depart from a long established policy," *Robertson*, 268 U.S. at 627. Accordingly, "[w]here there is no clear intention" to repeal or supersede, one statute will not be given priority over another statute or rule, "regardless of the priority of enactment." *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974). Critically, neither § 1915A's text nor operation evidences a "clear intention" to repeal or supersede Rules 8 or 15.

This Court has acknowledged "two well-settled categories of repeals by implication." *Kremer v. Chemical Constr. Co.*, 456 U.S. 461, 468 (1982) (quoting *Radzanower*, 426 U.S. at 154). "An implied repeal will only be found [1] where provisions in two statutes are in irreconcilable conflict, or [2] where the latter Act covers the whole subject of the earlier one and is clearly intended as a substitute." *Branch v. Smith*, 538 U.S. 254, 273 (2003) (plurality opinion) (internal quotation marks and citations omitted).

Section 1915A and Rules 8 and 15 are not in "irreconcilable conflict." *Id.*

> It is not enough to show that the two statutes produce differing results when applied to the same factual situation, for that no more than states the problem. Rather, "when two statutes are capable of co-existence, it is the duty of the courts * * * to regard each as effective." * * * "Repeal is to be regarded as implied only if necessary to make the (later enacted law) work, and even then only to the minimum extent necessary.

> This is the guiding principle to reconciliation of the two statutory schemes."

Radzanower, 426 U.S. at 155 (quoting *Morton*, 417 U.S. at 551; *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963)).

The PLRA and Rules 8 and 15 are plainly capable of co-existence because nothing in Rules 8 or 15 inhibit the operation of the PLRA and its screening provision. The PLRA's screening provision, like § 1997e(c)(1), provides that a district court "shall * * * dismiss" claims that are "frivolous, malicious, or fail[] to state a claim upon which relief may be granted; or * * * seek[] monetary relief from a defendant who is immune from such relief." 28 U.S.C. 1915A. Nowhere does § 1915A indicate that district courts are commanded to screen and dismiss without leave to amend for failure to exhaust administrative remedies. Indeed, as discussed earlier, § 1997e, the provisions of which govern both dismissal and exhaustion of administrative remedies, expressly distinguishes the § 1915A early dismissal grounds from dismissal for failure to exhaust administrative remedies. See *supra* Part II(B). Just as any reading of dismissal for failure to exhaust into § 1997e(c)(1) would be illogical and violate the rule against superfluities and *expressio unius* statutory-construction canon, reading dismissal for failure to exhaust into § 1915A would too. See *supra* Part II(B).

When § 1915A is properly read, (1) it requires only that a prisoner plaintiff plead "a short and plain statement," Fed. R. Civ. P. 8(a), establishing that his or her claim is not "frivolous, malicious, * * * fails to state a claim upon which relief may be granted; or * * * seeks monetary relief from a defendant who is immune from such relief," 28 U.S.C. 1915A, and (2) allows "leave [to amend to] be freely given," Fed. R. Civ. P. 15(a), unless the district court is *certain* the prisoner's claim is incurable. Since it is

possible for § 1915A and Rules 8 and 15 "to coexist in this manner," "they are not so repugnant to each other to justify a finding of an implied repeal by this Court." *Radzanower*, 426 U.S. at 156-57; see also *Kremer*, 456 U.S. at 471 ("Since an implied repeal must ordinarily be evident from the language or operation of a statute, the lack of such manifest incompatibility between [two provisions in apparent tension] is enough to end [this Court's] inquiry.").

Nor does Congress' enactment of § 1915A fall within the second category of repeals by implication because § 1915A does not "cover[] the whole subject of" federal pleading procedure. *Radzanower*, 426 U.S. at 157. Perhaps even more importantly, Congress could not have intended § 1915A to repeal Rules 8 and 15 by implication because, under either test, Congress did not "clear[ly] and manifest[ly]" intend to repeal Rules 8 and 15's applicability to PLRA suits. Neither the PLRA nor its legislative history indicates any intention to repeal – much less, even mention – Rule 8 or 15.

F. The Sixth Circuit's Heightened Pleading Requirement and "No Amendment" Rule Do Not Advance the Policies Underlying the PLRA

Where the statutory language and structure answer an interpretation question – as the PLRA's language and structure do here – resort to policy evaluation is inappropriate. See *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001) (noting that "[s]tatutory intent * * * is determinative" and that it will not be disregarded "no matter how desirable that might be as a policy matter"). But even if this Court were to take policy considerations into account, such considerations support rejection – rather than

endorsement – of the Sixth Circuit's heightened pleading and "no amendment" rules.

Neither the Sixth Circuit's heightened pleading requirement nor its "no amendment" rule advance Congress' goal of "improv[ing] the quality of prisoner suits," *Porter*, 534 U.S. at 524, because, like all of the Sixth Circuit's procedural rules at issue in these cases, they fall equally on meritorious and non-meritorious claims. Similarly, the Sixth Circuit's heightened pleading and "no amendment" rules do not advance the purpose to "afford[] corrections officials time and opportunity to address complaints internally" before suit is filed, *id.* at 524-25, because the rules have nothing to do with whether a prisoner's claims were actually exhausted. Rather, they simply present "a trap [for] the unwary pro se prisoner" without regard to the underlying claims' merit or to considerations of whether the claims were actually exhausted. *Slack*, 529 U.S. at 487 (internal quotations omitted). Even prisoners who pore over the pleading requirements of the Federal Rules will not know that they are required to document exhaustion or plead it with particularity until their complaint has already been dismissed and, under Sixth Circuit rules, it is too late to do anything about it.

Nor do these rules necessarily "reduce the quantity * * * of prisoner suits." *Porter*, 534 U.S. at 524. Instead, they "tend[] to increase, rather than to alleviate, the caseload burdens on * * * federal courts" because they require a prisoner to re-file a new complaint in a new suit with exhaustion sufficiently alleged or proven by attachments, even though the prisoner's non-compliance with the heightened pleading rule could be easily cured by an amended complaint. *Rose*, 455 U.S. at 522 (Blackmun, J., concurring in judgment). That new suit, based on whatever administrative record the prison system may have

already made, will impose duplicative filing, docketing, and processing costs on the system and require the court to re-familiarize itself with a case that has already undergone judicial scrutiny. See *id.* at 527-28 (Blackmun, J., concurring in judgment) (recognizing that "[i]n many cases a decision on the merits [of an exhausted claim] will involve only negligible additional effort," whereas requiring a prisoner to re-file his petition would result in "duplicative examination of the record and consideration of the exhausted claims – perhaps by another district judge").

Moreover, not only do the rules contravene this Court's oft-repeated admonition that "prisoner complaints * * * are held to less stringent standards than formal pleadings drafted by lawyers," *Hughes*, 449 U.S. at 9-10 (quotation omitted), they victimize *pro se* prisoners by punishing their technical mistakes. The ramifications of dismissing and requiring re-filing of exhausted but insufficiently pleaded claims are substantial and in effect punitive for prisoners. In addition to often being uneducated, unsophisticated, and legally inexperienced, prisoners are almost invariably poor. The fee for filing a new civil action in federal court is $350. 28 U.S.C. 1914(a). It scarcely needs to be noted that the vast majority of prisoners have great difficulty paying one filing fee, let alone multiple fees for each suit that is dismissed because of a technical pleading error.

The filing fee requirement applies even to prisoners granted leave to proceed *in forma pauperis*; indigent status simply allows prisoners to pay the filing fee in increments. 28 U.S.C. 1915(a)(2), (b). Moreover, the dismissal may constitute a "strike" for purposes of the PLRA's "three strikes" rule, which prevents prisoners who have had three actions or appeals dismissed for failure to state a claim, among other reasons, from filing *in forma pauperis*. 28 U.S.C. 1915(g). Although the circuits are

divided over whether dismissal for failure to exhaust constitutes a strike, a heightened pleading rule – if adopted by this Court – would be in effect even more punitive in the "non-exhaustion is a strike" jurisdictions. Compare *Steele*, 355 F.3d at 1213 (CA10 – non-exhaustion may be a strike) (dictum), and *Rivera*, 144 F.3d at 731 (CA 11 – non-exhaustion is a strike), with *Snider*, 199 F.3d at 111 (CA2 – non-exhaustion is not a strike); *Green v. Young*, 454 F.3d 405, 408-09 (CA4 2006) (same); and *Andrews v. King*, 398 F.3d 1113, 1120 (CA9 2005) (same). With these deterrents against filing non-compliant lawsuits already in place, there is no need to create another by reading a heightened pleading requirement incapable of cure by amendment into the PLRA's exhaustion provision, which was plainly not intended to have such a punitive or deterrent effect.

Finally, there is good reason to require prison officials to bear the burden of pleading exhaustion: They have greater ability to plead accurately about administrative exhaustion. E.g., *Wyatt*, 315 F.3d at 1119. Prison officials have lawyers and better access to prison records than prisoners.[23] E.g., *Ray*, 285 F.3d at 295. With their access to prison records, they are better equipped to provide courts with documentation and explanations of administrative proceedings. E.g., *ibid.*

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[23] For example, the Michigan Department of Corrections (MDOC) maintains copies of prisoner grievances so that they may be accessed "to respond to a request under the Freedom of Information Act, to respond to a request from the Office of Legislative Corrections Ombudsman, the Department of Attorney General or appropriate Central Office staff, for audits, or for statistical reporting." MDOC Policy Directive (PD) No. 03.02.130 ¶ (I) (Nov. 1, 2000). And, in certain facilities, the MDOC maintains a computerized grievance tracking system. *Id.* ¶¶ (Q)(1), (S)(1). Accordingly, it is unsurprising that respondents had no difficulty attaching to their motion to dismiss petitioner Jones' complaint the proof of exhaustion that the court of appeals faulted Jones for not providing with his complaint.

III. THE SIXTH CIRCUIT'S REQUIREMENT THAT PRISONERS IDENTIFY ALL POTENTIAL DEFENDANTS AT STEP ONE OF THEIR PRISON GRIEVANCE GOES BEYOND THE PLRA'S EXHAUSTION REQUIREMENT AND IS CONTRARY TO ESTABLISHED PRINCIPLES OF FEDERAL PLEADING PROCEDURE AND ADMINISTRATIVE LAW

A. The Sixth Circuit's "Name All Defendants" Rule Is Unsupported by the PLRA's Text and Inconsistent with the Federal Rules of Civil Procedure and Congress' Intention to Provide Prison Officials Notice of *Problems*

The Federal Rules of Civil Procedure reflect a policy of allowing free amendment of complaints, see Fed. R. Civ. P. 15(a) ("leave [to amend] shall be freely given"), and permissive joinder of parties up to the applicable limitations period, see Fed. R. Civ. P. 20 ("All persons * * * may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action"), and, in some cases, beyond, see Fed. R. Civ. P. 15(c)(3) (permitting amendment to name misnamed party to relate back to before the limitations expired). These rules acknowledge the difficulty that a litigant may face in marshaling the identities of all the individuals he wishes to sue and accommodate that difficulty by allowing a litigant to plead new claims and name additional defendants after discovery has sharpened the facts and issues.

The Sixth Circuit's blanket rule that prisoners are required to have identified a particular person in their Step I administrative grievance in order to sue that person

in subsequent litigation, see *Thomas v. Woolum*, 337 F.3d 720, 734, 735 (CA6 2003) (prisoners must "file grievances 'against' specific defendants" but "need not identify each officer by name when the identities of the particular officers are unknown"); *Burton v. Jones*, 321 F.3d 569, 575 (CA6 2003) ("[F]or a court to find that a prisoner has administratively exhausted a claim against a particular defendant, a prisoner must have alleged mistreatment or misconduct on the part of the defendant at Step I of the grievance process."); *Curry v. Scott*, 249 F.3d 493, 505 (CA6 2001) ("[A] prisoner [must] file a grievance against the person he ultimately seeks to sue."), represents a radical departure from the Federal Rules' flexible pleading tradition by freezing the universe of potential defendants the day that a prisoner files a Step I grievance.

Making the rule even more restrictive are (1) nearly uniformly short grievance deadlines, see Brief for Jerome N. Frank Legal Services Organization of the Yale Law School as *Amicus Curiae* Supporting Respondent at App. 1-5, *Woodford v. Ngo*, 126 S.Ct. 2378 (No. 05-416), and (2) § 1983's ban on *respondeat superior* liability, see *Polk County v. Dodson*, 454 U.S. 312, 325 (1981), and rigorous requirement of personal involvement, see, e.g., *Williams v. Smith*, 781 F.2d 319, 323-24 (CA2 1986) (acknowledging sufficient personal involvement for § 1983 supervisory liability where defendant (1) after learning of violation through report or appeal, failed to remedy the wrong; (2) created policy or custom under which unconstitutional practices occurred or allowed such policy or custom to continue; or (3) was grossly negligent in managing subordinates who caused unlawful condition or event). In cases other than those involving a face-to-face encounter, discerning the identities or job descriptions of officials responsible for alleged civil rights violations will be nearly

impossible within typical deadlines for filing Step I grievances.

Absent some indication to the contrary, Congress could not have intended to insulate so many prison officials from potential liability by effectively repealing Rules 15(a), 20, and 15(c) with respect to PLRA suits. See, e.g., *Radzanower*, 426 U.S. at 154; see also *supra* Part II(E) (applying repeal by implication test). Neither the statute nor its legislative history say anything about naming all of the individual perpetrators of a claimed civil rights violation during the prison grievance process. Accordingly, it is not surprising that neither the Sixth Circuit nor the one other circuit that appears to have a similar rule – the Eighth Circuit, *Kozohorsky v. Harmon*, 332 F.3d 1141, 1143 (2003) – have offered any textual support for their path-breaking rule.

In contrast to the Sixth Circuit's rule, a rule simply requiring notice of the problem being grieved would vindicate Congress' intent while avoiding any tension with the Federal Rules. This Court has repeatedly recognized that one of Congress' primary objectives in requiring PLRA exhaustion is providing prison officials notice of and an opportunity to address *the problem* that will later form the basis of the lawsuit, see *Ngo*, 126 S.Ct. at 2385 ("Exhaustion gives an agency 'an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court.'" (quoting *McCarthy*, 503 U.S. at 145)); see also *Porter*, 534 U.S. at 524-25 (holding that PLRA exhaustion "afford[s] corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case"), not to give notice to particular defendants that the prisoner plans to sue them. Faithful to this purpose, the Fifth Circuit has rejected the Sixth Circuit's blanket "name all defendants" rule and instead held properly that "[i]n

deciding how much detail is required in a given case * * * a grievance should be considered sufficient to the extent that the grievance gives officials a fair opportunity to address *the problem* that will later form the basis of the lawsuit." *Johnson v. Johnson*, 385 F.3d 503, 516-17 (CA5 2004) (emphasis added); see also *Johnson v. Testman*, 380 F.3d 691, 697 (CA2 2004) ("[I]nmates must provide enough information about the conduct of which they complain to allow prison officials to take appropriate responsive measures.").

Requiring prisoners to provide notice of the problem is also consistent with how prison grievances are resolved generally and in the MDOC specifically. As *amici* have shown, "prison officials do not decide grievances based solely on the characterization of who is responsible for the problem. Grievance policies overwhelmingly provide for investigation of prisoners' complaints." Brief of American Civil Liberties et al. as *Amici Curiae* at 12. The MDOC expressly requires at Step I that "[t]he grievant * * * be interviewed," PD ¶ (AA), that "[t]he grievant * * * have the opportunity to explain the grievance more completely at the interview," *ibid.*, and "that a thorough investigation of the grievance is completed" *id.* ¶ (Q)(4). At Step II, the MDOC allows "further investigation * * * as needed." *Id.* ¶ (S)(4).

The results of the MDOC's investigations in petitioner Walton's and petitioner Williams' cases confirm that the MDOC does not rely solely on the information provided on the Step I grievance form. At Step I, Walton named only respondent Bobo because that is whom Walton believed issued him the indefinite upper slot restriction. JAII 65. The MDOC's Step I response indicated, however, that respondent Gearin – not respondent Bobo – issued Walton the indefinite upper slot restriction. *Id.* at 66. The same is true in petitioner Williams' case. Williams' Step I denial of

surgery grievance did not name anyone. JAII 9. Nonetheless, the MDOC was able to identify in its Step II response defendant Pramstaller, JAII 15, who was responsible for denying Williams' surgery request, JAI 85. Accordingly, any claim – such as the claim levied by respondents at the petition stage, see 02-7142 BIO at 6 – that individuals must be identified in a Step I grievance for a prison to have "an opportunity to correct its own mistakes," *Ngo*, 126 S.Ct. at 2385, is belied by reality.

B. The Sixth Circuit's Imposition of an Exhaustion Requirement Beyond That Required by the Prison Grievance System Cannot Be Squared with *Sims v. Apfel*

The grievance procedures with which petitioners Williams and Walton had to comply required only that they "be as specific as possible" "limited to the issue being grieved." PD ¶ (U) (emphasis added). Similarly, the form they had to fill out directed them to "[b]e brief and concise in describing [the] grievance issue." E.g., JAII 1 (emphasis added). Neither the MDOC's grievance procedures nor the form required them to identify any individuals whom they believed responsible for violating their rights. Nonetheless, the court of appeals dismissed their claims because they failed to identify in their Step I grievances the individuals that they subsequently sued.

This Court in *Sims v. Apfel*, 530 U.S. 103 (2000), rejected just such an attempt by the judiciary to impose technical exhaustion requirements on an informal administrative process from which they are absent. In *Sims*, the plaintiff challenged the denial of her application for social security and disability benefits. She filed a lawsuit after utilizing the administrative procedures made available by the Social Security Act. *Id.* at 105. The Fifth Circuit

affirmed the dismissal of her claim because, although she exhausted her administrative remedies, her lawsuit challenging the denial of her benefits was based on issues not raised during the administrative process. *Id.* at 106.

This Court reversed, holding that the Fifth Circuit's requirement that a plaintiff exhaust her challenge to the denial of benefits through the administrative review system before filing a lawsuit did not explicitly require "issue exhaustion." *Id.* at 111-12. The Court explained that "the desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding." *Id.* at 109. The Social Security proceedings at issue were inquisitorial rather than adversarial because they were before an administrative law judge, with no separate representative advocating the Commissioner's position, and many claimants are unrepresented or represented by non-attorneys. Justice Thomas, writing for a four-Justice plurality, explained "that a judicially created issue-exhaustion requirement was inappropriate" in light of the informal, non-adversarial nature of the administrative proceedings, *id.* at 111-12.

While *Sims* involved a different kind of administrative exhaustion, its underlying premise is equally applicable here. The MDOC's grievance procedures provide for the filing of an initial grievance within seven days of the grievable incident, and for an investigation and disposition within fifteen days thereafter. PD ¶¶ (T), (Y), (CC). A prisoner may appeal an unsatisfactory response to within five days, and prison officials must resolve the appeal within fifteen days thereafter. *Id.* ¶¶ (DD), (FF). A prisoner then has ten days to file a final administrative appeal. *Id.* ¶ (GG). The procedures require an informal interview but not hearings. *Id.* ¶ (AA). It is difficult to imagine an administrative proceeding that is less akin to adversarial

litigation than the prison grievance procedures at issue here. See *Cleavinger v. Saxner*, 474 U.S. 193, 196 (1985). Given the nature of the administrative process for resolving prison grievances, the Sixth Circuit's rule cannot be reconciled with *Sims*.

C. The Sixth Circuit's "Name All Defendants" Rule Is Incompatible with This Court's "Proper Exhaustion" Framework

The PLRA's exhaustion provision says simply that prisoners suing over prison conditions should exhaust available administrative remedies. "Exhaust," as a matter of common sense and definition, means to follow an administrative process to its end. 5 Oxford English Dictionary 534 (2d ed. 1989) ("To use up completely (either a material or immaterial thing); to expend the whole of; to consume entirely."). This Court has explained, based on the administrative law understanding that Congress had in mind when it enacted the PLRA, that the statute requires "proper exhaustion * * * which 'means using all steps that the agency holds out, and doing so *properly* (so that the agency addresses the issues on the merits).'" *Ngo*, 126 S.Ct. at 2385 (quoting *Pozo*, 286 F.3d at 1024).

That is exactly what petitioners did. They filed grievances in compliance with MDOC procedure; they received decisions on the merits; and in no case did the grievance system reject a grievance or appeal or indicate it could not reach the merits because they failed to provide sufficient information. Under *Ngo*, those facts are dispositive on the question of exhaustion.[24] The same conclusion follows from

[24] The reverse may not be true in all cases. *Ngo* made clear that it did not address situations where procedural rules were designed to hoodwink prisoners, 126 S.Ct. at 2392-93, and Justice Breyer noted

(Continued on following page)

considering the purposes of the exhaustion requirement, as identified by this Court: "to 'affor[d] corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case,' . . . [and] to 'reduce the quantity and improve the quality of prisoner suits.'" *Ngo*, 126 S.Ct. at 2387. The latter may be accomplished by creating an administrative record. *Id.* at 2388. Where, as here, prisoners have used the administrative process, prison officials have heard and ruled on their claims, and have made whatever record they deem appropriate, the purposes as well as the language of § 1997e(a) are satisfied.

This conclusion has been made explicit by circuits that adopted a "proper exhaustion" framework before *Ngo*. These courts agree that if prison authorities hear and address the merits of a grievance, the exhaustion requirement is satisfied regardless of procedural defects that may be cited in subsequent litigation. See *Spruill v. Gillis*, 372 F.3d 218, 234 (CA3 2004) ("[T]he prison can excuse an inmate's failure to [name someone in his grievance] by identifying the unidentified persons and acknowledging that they were fairly within the compass of the prisoner's grievance"); *Gates v. Cook*, 376 F.3d 323, 331 n.6 (CA5 2004) (noting that officials had decided the grievance despite plaintiff's sending it to the wrong official); *Barnes v. Briley*, 420 F.3d 673, 679 (CA7 2005) (holding claim was not procedurally defaulted where an initial grievance was rejected as untimely but plaintiff later "restarted" the grievance process and received a decision on the merits); *Ross*, 365 F.3d at 1186 (CA10) ("If a prison accepts a

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that administrative and habeas law "contain[] well established exceptions" to exhaustion requirements. *Id.* at 2393 (Breyer, J., concurring in judgment) (citing *Giano v. Goord*, 380 F.3d 670, 677 (CA2 2004); *Spruill*, 372 F.3d at 232).

belated filing, and considers it on the merits, that step makes the filing proper for purposes of state law and avoids exhaustion, default, and timeliness hurdles in federal court"). That proposition is especially apposite here, where respondents have not relied upon any failure by petitioners to comply with the requirements of the grievance system.

IV. THE PLRA EXHAUSTION REQUIREMENT DOES NOT REQUIRE THE SIXTH CIRCUIT'S "TOTAL EXHAUSTION" RULE UNDER WHICH PROPERLY EXHAUSTED CLAIMS MUST BE DISMISSED BECAUSE OF THE PRESENCE OF ONE OR MORE UNEXHAUSTED CLAIMS

A. The PLRA's Text and Structure Show No Intent by Congress to Depart from the "Fundamental Procedural Norm" that Only Non-Compliant Claims Should Be Dismissed from a Mixed Complaint Containing Both Compliant and Non-Compliant Claims

The "fundamental procedural norm * * * when a complaint has both good and bad claims, in the sense of claims that can and claims that cannot survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), [is that] only the bad claims are dismissed; the complaint as a whole is not." *Robinson v. Page*, 170 F.3d 747, 748-49 (CA7 1999) (Posner, C.J.); see also *Exxon Mobil Corp v. Allapattah Servs., Inc.*, 125 S.Ct. 2611, 2621 (2005) (rejecting "indivisibility" and "contamination" theories, under which jurisdictional defect for one claim or defendant would require entire action to be dismissed). Conceding the absence of any express command from Congress that a court should depart from this "fundamental procedural norm" in PLRA cases, see *Ross*, 365 F.3d at 1190 (CA10 2004) (acknowledging that the PLRA

only "suggests" a "total exhaustion" rule), the Sixth, Eighth, and Tenth Circuits have held that the presence of any unexhausted claim, including a claim that is exhausted as to some defendants but not as to others, contaminates the entire complaint and requires its dismissal in its entirety.[25] See *Jones Bey*, 407 F.3d at 805 (CA6); *Abdul-Muhammad v. Kempker*, 450 F.3d 350, 352 (CA8 2006); *Ross*, 365 F.3d at 1190 (CA10). A straightforward reading of the PLRA's text and structure, however, reveals that Congress carefully declined to impose any such rule.[26]

The primary justification offered by courts espousing the rule is that Congress' use of the word "action" in § 1997e(a)'s phrase "[n]o action shall be brought * * * until * * * administrative remedies * * * are exhausted" indicates that Congress intended that any action containing any unexhausted claims not be allowed to go forward. *Jones Bey v. Johnson*, 407 F.3d 801, 807 (CA6 2005), pet. for cert. pending, No. 05-874 (filed Jan. 9, 2006); *Ross*, 365 F.3d at 1190; *Graves v. Norris*, 218 F.3d 884, 885 (CA8 2000) (per curiam). But this asserted justification is a red herring. The only thing that § 1997e(a) establishes is what constitutes a non-compliant action; it does not say what a district court must do about it. In the absence of an actual instruction by Congress to dismiss partly exhausted actions, there is no basis for departing from the "fundamental procedural norm" to dismiss non-viable claims and allow the viable ones – in this instance, the exhausted

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[25] The Eighth Circuit's rule is somewhat tempered by its requirement that, after dismissing a mixed PLRA complaint, district courts must grant prisoners leave to amend their unexhausted claims. *Kozohorsky*, 332 F.3d at 1144.

[26] The PLRA's legislative history is entirely silent on the subject. *Ortiz*, 380 F.3d at 658.

ones – to go forward. Thus, the Sixth, Eighth, and Tenth Circuit's reliance on § 1997e(a) "to kill [a non-compliant complaint] rather than to cure it," reflects a flawed analytical leap without any support in the provision's language. *Ortiz v. McBride*, 380 F.3d 649, 657 (CA2 2004), cert. denied, 125 S.Ct. 1398 (2005).

The same conclusion follows from other relevant provisions of § 1997e. Two provisions, § 1997e(c)(1) and (2), deal specifically with dismissal, and that is "the place where we would expect to find guidance as to whether dismissal of 'mixed actions' is required." *Ortiz*, 380 F.3d at 657. Moreover, because § 1997e(c), like § 1997e(a), employs the term "action," the "'normal rule of statutory construction' that 'identical words used in different parts of the same act are intended to have the same meaning,'" requires that § 1997e(c) be consulted. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) (quoting *Dep't of Revenue v. ACF Indus., Inc.*, 510 U.S. 332, 342 (1994)); see also *Nat'l Credit Union Admin. v. First Nat. Bank & Trust Co.*, 522 U.S. 479, 501 (1998) (applying the "established canon of construction that similar language within the same statutory section must be accorded a consistent meaning"); *Mertens v. Hewitt*, 508 U.S. 248, 260 (1993) ("[L]anguage used in one portion of a statute (§ 502(a)(3)) should be deemed to have the same meaning as the same language used elsewhere in the statute (§ 502(a)(5))."); 2A Singer, *supra*, § 47:16 ("Where the meaning of a word is unclear in one part of a statute but clear in another part, the clear meaning can be imparted to the unclear usage on the assumption that it means the same thing throughout the statute."). For three reasons, § 1997e(c) indicates that Congress did not intend to require district courts to dismiss an entire non-compliant action because the action contains one or more unexhausted claims.

First, neither § 1997e(c)(1) nor (2) requires dismissal of a prisoner's complaint in its entirety whenever it contains one or more unexhausted claims. See *Ortiz*, 380 F.3d at 657. ("Section 1997e(c) * * * is silent on the issue."). This Congressional silence is striking because, as discussed earlier (*supra* Part II(B)), Congress was plainly concerned with exhaustion when it enacted § 1997e. Section 1997e(a) is the mandatory exhaustion provision itself, and § 1997e(c)(2) specifically references a court's power to dismiss certain "claim[s] without first requiring exhaustion." Notably, although § 1997e(c)(1) delineates the circumstances under which a district court shall dismiss an entire "action," it fails to list partially unexhausted "actions" among them. It would have been no tall order for Congress, had it wished to impose a "total exhaustion" rule, to have stated in § 1997e(c)(1):

> The court shall on its own motion or on the motion of a party dismiss any action * * * if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, * * * seeks monetary relief from a defendant who is immune from such relief, *or contains any unexhausted claims.*

But this is not what Congress said. Congress' omission indicates that no special rule regarding the treatment of partly unexhausted actions was intended. *Lira v. Herrera*, 427 F.3d 1164, 1172 (CA9 2005), petition for cert. pending, No. 05-878 (filed Jan. 6, 2006). To this end, "the most natural reading of § 1997e(c)(1) is that it simply restates the proposition that is implicit in Rule 12(b)(6), *i.e.*, if a claim is based on facts that provide no basis for granting relief by the court, the *claim* must be dismissed." *Shane v. Fauver*, 213 F.3d 113, 117 (CA3 2000); see also *Robinson*, 170 F.3d at 748-49.

Second, § 1997e(c)(2)'s reference to dismissal of unexhausted "claims," juxtaposed to § 1997e(c)(1)'s reference to dismissal of an "action," indicates that unexhausted claims can be treated independently, for dismissal purposes, from the action as a whole. "There would be little point in providing for the dismissal of some nonexhausted claims on the merits if the remainder of the action would then have to be dismissed, although exhausted, because of the failure to exhaust the dismissed claims." *Lira*, 427 F.3d at 1172.

Third, interpreting the word "action" in § 1997e(a) and (c)(1) to indicate that an exhaustion defect in any claim infects the suit as a whole "would 'render[] subsection (c)(2) superfluous.'" *Ibid.* (quoting *Jones Bey*, 407 F.3d at 811 (Clay, J., concurring in part and dissenting in part)). If § 1997e(a) demands dismissal of a mixed complaint because it uses the word "action," then § 1997e(c)(1), because it uses the word "action," must also require dismissal of the entire complaint if any claim is "frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief." "Yet, § 1997e(c)(1) must apply only when *all* the claims meet the statutory standard for summary dismissal on the merits, not when only some of them do." *Ibid.*; see also *Jones Bey*, 407 F.3d at 811 (Clay, J., concurring in part and dissenting in part). Otherwise, § 1997e(c)(2), which contemplates the dismissal of individual "claims" that are "frivolous, malicious, fail[] to state a claim upon which relief can be granted, or seek[] monetary relief from a defendant who is immune from such relief," would be unnecessary. In other words, the inclusion of a single frivolous claim would "contaminate the entire action," mandating dismissal under § 1997e(c)(1). *Lira*, 427 F.3d at 1172. To read § 1997e(c)(1)'s use of the word "action" as precluding dismissal of individual defective

claims would, therefore, violate the rule against superfluities. See, e.g., *Hibbs*, 542 U.S. at 101; see also *supra* Part II(B) (discussing the rule against superfluities).

Section 1997e(e), which also expressly governs dismissal of certain PLRA "actions," reinforces that the Sixth, Eighth, and Tenth Circuits' construction of that term cannot prescribe dismissal of a mixed complaint. Section 1997e(e) provides: "No federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." Under the Sixth, Eighth, and Tenth Circuits' unitary approach to the term "action," dismissal of the entire case would be warranted. Notably, the courts of appeals have unanimously declined to interpret the phrase "no Federal civil action may be brought" in § 1997e(e) to impose a total compliance rule that would require dismissal of the entire complaint if even a single claim is defective.[27] See *Allah v. Al-Hafeez*, 226 F.3d 247, 250-52 (CA3 2000); *Calhoun v. Hargrove*, 312 F.3d 730, 734 (CA5 2002); *Robinson*, 170 F.3d at 748 (CA7); *Royal v. Kautzky*, 375 F.3d 720, 723 (CA8 2004); *Oliver v. Keller*, 289 F.3d

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[27] The courts of appeals have also repeatedly interpreted administrative exhaustion provisions in other statutes as requiring dismissal of only unexhausted claims in mixed complaints:

- ADA: *Marshall v. Fed. Express Corp.*, 130 F.3d 1095, 1098-99 (CADC 1997)
- FTCA: *Palay v. United States*, 349 F.3d 418, 425-27, 434 (CA7 2003)
- INA: *Abdulrahman v. Ashcroft*, 330 F.3d 587, 594-95 (CA3 2003)
- Title VII: *Patrick v. Henderson*, 255 F.3d 914, 916 (CA8 2001); *Butts v. City of New York Dep't of Hous. Pres. & Dev.*, 990 F.2d 1397, 1401 (CA2 1993).

623, 629-30 (CA9 2002); *Searles v. Van Bebber*, 251 F.3d 869, 876, 881 (CA10 2001).

In sum, neither the text of § 1997e(a) nor the use of the term "action" elsewhere in the PLRA supports interpreting § 1997e(a) as dictating the Sixth, Eighth, and Tenth Circuits' "total exhaustion" rule. Although § 1997e(a)'s use of the term "action" "may seem ambiguous in isolation," its meaning is "clarified by the remainder of the statutory scheme," *viz.*, § 1997e(c) and (e), "because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (citation omitted). Thus, while "action" in the PLRA refers to the case as a whole, the statute consistently uses the term in a manner that contemplates dismissing an entire action only if the entire action fails to meet statutory standards. *Lira*, 427 F.3d at 1173. When some claims are valid and others are not, the usual procedural norm – that when a complaint has both good and bad claims, only the bad claims are dismissed – should prevail. And, as Judge Posner recognized in *Robinson*, "[i]f Congress meant to depart from this norm, we would expect some indication of that, and we find none." 170 F.3d at 749.

B. The Habeas Corpus "Total Exhaustion" Rule Does Not Support a PLRA "Total Exhaustion" Rule, and Certainly Not the Harsher Rule Prescribed by the Sixth and Tenth Circuits

In adopting their "total exhaustion" rule, the Sixth and Tenth Circuits reasoned alternatively that this Court's adoption of a "total exhaustion" rule in the habeas context in *Rose v. Lundy* justified adoption of a similar rule in the

PLRA context. *Jones Bey*, 407 F.3d at 808 ("Because we recognize the correlation between habeas petitions and § 1983 actions, we find it appropriate to interpret the PLRA exhaustion requirement in light of habeas corpus rules."); *Ross*, 365 F.3d at 1189-90 (discussing *Rose* and adopting the "total exhaustion" rule in the PLRA context).

Drawing on habeas corpus law is unnecessary because the PLRA's text and structure are sufficient to resolve the relevant questions. *Lira*, 427 F.3d at 1173. Further, although the Court's opinion in *Ngo* defining the statutory term "exhausted" was "inform[ed]" by habeas law, 126 S.Ct. at 2393 (Breyer, J., concurring), there are significant differences between habeas proceedings and prison civil rights litigation that make adoption of the judge-made habeas "total exhaustion" rule inapposite. See *Muhammad v. Close*, 540 U.S. 749, 751 (2004) ("Federal petitions for habeas corpus may be granted only after other avenues of relief have been exhausted. Prisoners suing under § 1983, in contrast, generally face a substantially lower gate, even with the requirement of the Prison Litigation Reform Act of 1995 that administrative opportunities be exhausted first." (citations omitted)).

First, *Rose* created a habeas "total exhaustion" rule admittedly for policy reasons because the applicable habeas statute did not address the question what to do with mixed petitions. 455 U.S. at 516-17 (analyzing the "policies underlying the statutory provision to determine its proper scope" when the text found to be ambiguous). Because the PLRA's language and structure are sufficient to resolve the "determinative" question whether Congress intended a "total exhaustion" rule, policy considerations are inappropriate "no matter how desirable that might be." *Alexander*, 532 U.S. at 286-87.

Second, in *Rose*, the Court explained that the policy underlying the exhaustion requirement in habeas corpus

law is federal-state comity. *Rose*, 455 U.S. at 515 ("[A]s a matter of comity, federal courts should not consider a claim in a habeas corpus petition until after the state courts have had an opportunity to act."). The Court reasoned that "a total exhaustion rule promotes comity and does not necessarily impair the prisoner's right to relief." *Id.* at 521. The concerns of comity between the judicial systems of coordinate sovereigns are simply not applicable either to the substance of complaints about prison conditions or to the kinds of informal, not-even-quasi-judicial administrative procedures that are most typical in the Nation's prisons and jails for resolving grievances that cover topics from food to medical care to religion to discipline. The federal courts in prison civil rights cases do not re-examine questions that have already been presented to the state judiciary and potentially overturn the state judiciary's judgments as they do in habeas proceedings. Indeed, the Court has recognized that challenges to the conditions of confinement do not raise the same comity concerns that challenges to the fact or duration of confinement raise. *Wilkinson v. Dotson*, 125 S.Ct. 1242, 1249 (2005) (rejecting argument that permitting prisoner's § 1983 lawsuit without prior exhaustion of state-court remedies would compromise principles of federal-state comity).

Finally, the remaining rationale for the adoption of the "total exhaustion" rule in the habeas context was that "federal claims that have been fully exhausted in state courts will more often be accompanied by a complete factual record to aid the federal courts in their review." *Rose*, 455 U.S. at 518-19. In civil rights cases, there is no analogous requirement that federal courts defer to the findings or legal conclusions of prison grievance administrators. Moreover, this Court has previously noted that

prison administrative hearings often will not yield a useful factual record:

> The prisoner was to be afforded neither a lawyer nor an independent nonstaff representative. There was no right to compel the attendance of witnesses or to cross-examine. There was no right to discovery. There was no cognizable burden of proof. No verbatim transcript was afforded. Information presented often was hearsay or self-serving. The committee members were not truly independent. In sum, the members had no identification with the judicial process of the kind and depth that has occasioned absolute immunity.

Cleavinger, 474 U.S. at 206.[28] None of the rationales underlying a "total exhaustion" rule in the habeas context apply in the PLRA context.

Further, there is a significant functional difference between habeas proceedings and civil litigation that makes any habeas analogy especially inapposite to the PLRA in the present context. "Total exhaustion" in habeas makes sense because habeas proceedings are ultimately about one thing: the criminal judgment keeping the prisoner in custody. See *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977) (holding that enforcing state procedural requirements is essential because "the state criminal process should be the 'main event' rather than a 'tryout on the road' to a dispositive federal habeas hearing."). Accordingly, it makes sense to address all challenges to that

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[28] *Ngo* is not the contrary. *Ngo* simply cited *McCarthy* for the proposition that "'exhaustion of the administrative procedure *may* produce a useful record for subsequent judicial consideration.'" 126 S.Ct. at 2385 (quoting *McCarthy*, 503 U.S. at 145) (emphasis added). The terse denials of petitioners' grievances and appeals contained in the Joint Appendix confirm the *de minimis* utility of the administrative records created by prison grievance procedures.

judgment together, and – as a matter of comity as well as efficiency and common sense – to subject the state judiciary's judgment to federal scrutiny only once. The same is not true of prison civil rights litigation, where separate claims do not necessarily stand or fall together even if there is some factual overlap and where the long-established rule is permissive joinder under the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 18(a), 20(a); *Lira*, 427 F.3d at 1174 ("Which claims are joined in a given PLRA lawsuit * * * is largely up to the plaintiff" unlike "the habeas context, where a single conviction is at issue"); *Ortiz*, 380 F.3d at 661 ("[S]ection 2254 applications are usually about a singular event – the petitioner's conviction in state court," whereas "section 1983 actions, by contrast, routinely seek to address more than one grievance – sometimes a laundry list of grievances – relating to different events or circumstances"). Thus, the Sixth and Tenth Circuit's concerns about "piecemeal litigation," *Jones Bey*, 407 F.3d at 808; *Ross*, 365 F.3d at 1190, while important to allow federal habeas courts to review the prisoner's underlying conviction in one sitting, *Rose*, 455 U.S. at 520, are largely irrelevant here.

There is another key distinction that the Sixth and Tenth Circuits overlooked in adopting a "total exhaustion" rule in reliance on habeas law. Because there was no statute of limitations for the filing of habeas corpus petitions when *Rose* was decided in 1983, the "total exhaustion" rule did not threaten to extinguish a prisoner's right to bring a habeas corpus petition. At most, it would *delay* a federal court's adjudication of a prisoner's exhausted claims while the prisoner litigated the unexhausted claims through the state court system (or, alternatively, filed a new federal petition containing only the exhausted claims). In contrast, § 1983 claims are subject to statutes of limitations. *City of Rancho Palos*

Verdes, California v. Abrams, 125 S.Ct. 1453, 1460 n.5 (2005) ("The statute of limitations for a § 1983 claim is generally the applicable state-law period for personal-injury torts."). Thus, the dismissal of an exhausted § 1983 claim, simply because it is presented along with an unexhausted claim, could effectively *bar* a meritorious civil rights claim forever.

This Court previously has recognized the significance of a statute of limitations in its analysis of the "total exhaustion" rule. In 1996, thirteen years after *Rose* was decided, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 124 (1996), which imposed a one-year statute of limitations for federal habeas petitions (which is tolled during the pendency of a state habeas petition). In *Rhines v. Weber*, 125 S.Ct. 1528 (2005), the Court examined the habeas "total exhaustion" requirement for the first time since the passage of the AEDPA. The Court expressly noted the effect of a statute of limitations on the "total exhaustion" rule:

> As a result of the interplay between AEDPA's 1-year statute of limitations and [*Rose*]'s dismissal requirement, petitioners who come to federal court with 'mixed' petitions run the risk of forever losing their opportunity for any federal review of their unexhausted claims.

Id. at 1533. The Court held that if a prisoner had good cause for failing to exhaust a potentially meritorious claim, the petitioner's interest in obtaining federal review of his claims outweighs the competing interests, such that it would be an abuse of discretion to apply the "total exhaustion" rule and dismiss a mixed petition. *Id.* at 1535.

The interplay between the rigid without leave to amend "total exhaustion" rule applied in the Sixth and Tenth Circuits and the statute of limitations applicable to

§ 1983 claims would have the same results recognized by the Court in *Rhines*: It would force prisoners to "run the risk of forever losing their opportunity for any federal review" of their civil rights claims. *Rhines*, 125 S.Ct. at 1533; see also *Lira*, 427 F.3d at 1175 ("[D]ismissal of the action for lack of total exhaustion could result in an inability to pursue the *exhausted* claim, because of a statute of limitations barrier.").

Finally, despite its purported reliance on habeas law, the court of appeals in these cases inexplicably applied a "total exhaustion" rule considerably harsher than the habeas rule. *Rose* expressly held that a habeas petitioner "can always amend the petition to delete unexhausted claims." 455 U.S. at 520. There is nothing in habeas law (or, as we show above, anywhere else) to support the proposition that civil rights litigants, unlike habeas petitioners, should be denied this option. Moreover, *Rhines* modified the *Rose* rule to allow district courts to stay habeas petitions containing both exhausted and unexhausted claims to allow petitioners to exhaust their unexhausted claims in state court without having to re-file and face a possible statute of limitations bar.[29] 125 S.Ct. at

[29] The overwhelming majority of unexhausted claims that would be severed and stayed – should the Court apply *Rhines* to the PLRA – would not come back exhausted because a grievance filed at that point would likely be untimely. See *Ortiz*, 380 F.3d at 663. This is particularly true after *Ngo*'s endorsement of a procedural default rule. After *Ngo*, the only unexhausted claims that may come back are those (1) brought by prisoners incarcerated in a rare jurisdiction, like North Carolina, with a sufficiently long deadline for filing grievances, see North Carolina Dep't of Corr., *Rules and Policies Inmate Booklet*, § 20(6)(a) (Mar. 2002), *available at* http://www.doc.state.nc.us/Publications/inmate%20rule%20book.pdf (one-year grievance deadline), such that the prisoner may return to the grievance process and exhaust the dismissed claim before returning to court, or (2) brought by prisoners incarcerated in institutions with shorter deadlines for filing grievances but where

(Continued on following page)

1535. Thus, the Sixth and Tenth Circuits' habeas analogy "does not support the inflexible total exhaustion-dismissal rule" that the court of appeals applied. *Lira*, 427 F.3d at 1173 n.10.

C. No Other Policy Considerations Justify a "Total Exhaustion" Rule

The Sixth and Tenth Circuits also attempted to defend their "total exhaustion" rule on policy grounds that they believe further the PLRA's purposes. Even if this Court were to take policy considerations into account – which, as we note above, see *supra* Parts I, II(F), IV(B), it should not – such considerations support rejection – rather than endorsement – of the Sixth and Tenth Circuit's "total exhaustion" rule.

The Sixth and Tenth Circuits' "total exhaustion" rule does not advance the goal of "improv[ing] the quality of prisoner suits," *Porter*, 534 U.S. at 524, because, like all of the Sixth Circuit's procedural rules at issue in these cases, it falls equally on meritorious and non-meritorious claims by punishing the technical mistakes of unsophisticated prisoners at either the administrative grievance or federal court pleading stages.[30] Nor does the Sixth and Tenth Circuits' "total exhaustion" rule necessarily "reduce the

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prison officials will excuse the prisoner's untimeliness, see Kermit Roosevelt III, *Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 Emory L.J. 1771, 1810 & n.192 (2003) (observing that most grievance systems give administrators the discretion to hear procedurally noncompliant grievances). Nonetheless, if the Court were to analogize to habeas in crafting a total exhaustion rule, the Court should not cut off the possibility that some prisoners may be able to resuscitate their unexhausted claims.

[30] Whenever a court dismisses a prisoner's complaint for failure to comply with an extra-statutory technicality, the PLRA's unforgiving filing fee provisions (see *supra* Part II(F)) render the dismissal punitive.

quantity * * * of prisoner suits." *Ibid.* Instead, it "tends to increase, rather than to alleviate, the caseload burdens on * * * federal courts." *Rose*, 455 U.S. at 522 (Blackmun, J., concurring in judgment). The "total exhaustion" rule "create[s] an incentive for prisoners to file section 1983 claims, if they have more than one, in more than one lawsuit." *Ortiz*, 380 F.3d at 658. A prisoner who has already filed a non-compliant mixed complaint and had it dismissed may often re-file, including in his second suit only his properly exhausted claims. *Lira*, 427 F.3d at 1174; see also *Ortiz*, 380 F.3d at 658. To the extent that the prisoner is still able to exhaust his unexhausted claims (see *supra* note 29), he may later file yet another suit containing his newly-exhausted claims. *Lira*, 427 F.3d at 1174; see also *Jones Bey*, 407 F.3d at 811-12 (Clay, J., concurring in part and dissenting in part). To this end, the Sixth and Tenth Circuits' "total exhaustion" rule promotes "the precise inefficiency the PLRA was designed to avoid – requiring courts to docket, assign, and process [at least] two cases where one would do." *Lira*, 427 F.3d at 1174; see also *Ortiz*, 380 F.3d at 659.

The "total exhaustion" rule does not advance the purpose to "afford corrections officials time and opportunity to address complaints internally" before suit is filed, *Porter*, 534 U.S. at 524-25, any more than a claim exhaustion rule does. Under either rule, a court will not consider a prisoner's claim that was not first properly exhausted. Whatever interest Congress had in encouraging prisoners to exhaust the grievance process is already protected by a rule requiring courts to dismiss those *claims* that the prison had no opportunity to review. Since there is no risk of a prisoner using "the exhaustion of one claim as a hook to have many exhausted claims considered in a federal civil rights action, adoption of a total exhaustion-dismissal rule would do nothing to advance Congress's policy goals."

Lira, 427 F.3d at 1175 (internal quotation marks and citation omitted). Similarly, a "total exhaustion" rule would not prospectively "encourage prisoners to make full use of inmate grievance procedures" for future claims. *Ross*, 365 F.3d at 1189. Under the procedural default rule endorsed by this Court in *Ngo*, prisoners already have a powerful incentive to promptly and properly exhaust all of their claims because, except in rare instances, they will not be able to resuscitate their stale claims later. See *supra* note 29.

A "total exhaustion" rule also fosters judicial inefficiency. PLRA actions – like any action requiring administrative exhaustion – may present genuine and challenging exhaustion questions. In such a case, a district court must first familiarize itself with the case and hear the positions of the parties. Under the Sixth and Tenth Circuits' "total exhaustion" rule, the presence of one unexhausted claim would require dismissal of the entire action only to have the same case – absent the unexhausted claims – re-filed, re-heard on the exhausted issues, and decided. Petitioner Williams' case demonstrates this inefficiency. Applying its "total exhaustion" rule, the Sixth Circuit required dismissal of both of Williams' unrelated claims even though there is no dispute that Williams exhausted his single-occupancy cell claim. Critically, however, the dismissal of both of Williams' claims to allow him to try to exhaust his denial of surgery claim will do nothing to assist the lower courts in addressing Williams' single-occupancy cell claim because that claim has already been fully exhausted and an administrative record has already been fully developed. See *Lira*, 427 F.3d at 1174 ("[E]xhausting one of these causes of action would not help satisfy the plaintiff, weed out frivolous complaints, or develop an administrative record with respect to the other [claims], entirely separate matters."). This inefficiency is likely even greater where

the prisoner's exhausted and unexhausted claims are factually interrelated because, in such a case, "the district court is * * * required to familiarize itself with the same factual background of the case twice." *Ortiz*, 380 F.3d at 659; see also *Rose*, 455 U.S. at 527-28 (Blackmun, J., concurring in judgment) (recognizing that "[i]n many cases a decision on the merits [of an exhausted claim] will involve only negligible additional effort," whereas requiring a prisoner to re-file his petition would result in "duplicative examination of the record and consideration of the exhausted claims – perhaps by another district judge").

CONCLUSION

The judgments of the court of appeals should be reversed.

Respectfully submitted,

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STATUTORY APPENDIX

1. 28 U.S.C. 1915A provides, in relevant part:

(a) Screening. The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.

(b) Grounds for dismissal. On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint –

(1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or

(2) seeks monetary relief from a defendant who is immune from such relief.

2. 42 U.S.C. 1997e provides, in relevant part:

(a) Applicability of administrative remedies

No action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 USC § 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

* * *

(c) Dismissal

(1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 USC § 1983), or any other Federal law, by a

prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.

(2) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.

* * *

(e) Limitation on recovery

No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

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Nos. 05-7058 and 05-7142

Supreme Court, U.S.
FILED
SEP 18 2006
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

LORENZO L. JONES,
Petitioner,
v.
BARBARA BOCK, ET AL.,
Respondents.

TIMOTHY WILLIAMS,
Petitioner,
v.
WILLIAM S. OVERTON, ET AL.,
Respondents.

JOHN H. WALTON,
Petitioner,
v.
BARBARA BOUCHARD, ET AL.,
Respondents.

On Petition For Writ Of Certiorari
to the United States Court of Appeals for the Sixth Circuit

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QUESTIONS PRESENTED

1. Whether the Prison Litigation Reform Act (PLRA) requires a prisoner to name a particular defendant in his or her administrative grievance in order to exhaust his or her administrative remedies as to that defendant and to preserve his or her right to sue them.

2. Whether the PLRA prescribes a "total exhaustion" rule that requires a federal district court to dismiss a prisoner's federal civil rights complaint for failure to exhaust administrative remedies whenever there is a single unexhausted claim, despite the presence of other exhausted claims.

3. Whether satisfaction of the PLRA's exhaustion requirement is a prerequisite to a prisoner's federal civil rights suit such that the prisoner must allege in his complaint how he exhausted his administrative remedies (or attach proof of exhaustion to the complaint), or instead, whether non-exhaustion is an affirmative defense that must be pleaded and proven by the defense.

LIST OF PARTIES TO THE PROCEEDINGS

Jones v Bock (05-7058):

1. Plaintiff-Petitioner Lorenzo Jones.
2. Defendants-Respondents:

    a. Barbara Bock, Warden of the Saginaw Correctional Facility
    b. Valerie A. Chaplin, Assistant Deputy Warden
    c. Defendant-Respondent Paul Morrison, Classification Director
    d. Michael Opanasenko, Corrections Officer

3. Janet Konkle, R.N. and Ahmad Aldabagh, M.D. were included in the complaint initially as John Doe and Jane Doe. Petitioner later provided the names of Konkle and Aldabagh in response to a Court order requiring their names. Konkle and Aldabagh were never served with process.

***Williams v Overton* (05-7142):**

1. Plaintiff-Petitioner Timothy Williams.
2. Defendants-Respondents:

    a. William Overton, former Director of the Michigan Department of Corrections
    b. David Jamrog, Warden of the Gus Harrison Correctional Facility (ARF)
    c. Mary Jo Pass, Assistant Deputy Warden at ARF
    d. Paul Klee, Assistant Deputy Warden at ARF
    e. Chad Markwell, Corrections Officer at ARF
    f. Bonnie Peterson, Health Unit Manager at ARF

3. Petitioner named Dr. George Pramstaller, the Chief Medical Officer for the MDOC, as a Defendant but never served him.

Walton v Bouchard (05-7142):

1. Plaintiff-Petitioner John Walton.
2. Defendants-Respondents:

    a. Barbara Bouchard, former Warden of the Alger Maximum Correctional Facility (LMF)
    b. Ken Gearin, Assistant Deputy Warden at LMF
    c. David Bergh, Assistant Deputy Warden at LMF
    d. Catherine Bauman, Resident Unit Manager at LMF
    e. Denise Gerth, Assistant Resident Unit Supervisor at LMF
    f. Ron Bobo, Assistant Deputy Warden at LMF

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STATEMENT OF THE CASE

Michigan Department of Corrections (MDOC) Grievance and Appeal Process

Michigan's grievance process allows prisoners a "[M]ethod of seeking redress for alleged violations of policy and procedure or unsatisfactory conditions of confinement." MDOC Policy Directive (PD) 03.02.130 ¶ I (effective November 1, 2000). (JA I, p 138). Except when otherwise noted, references are to the version of PD 03.02.130 in effect from November 1, 2000 to April 28, 2003. The events giving rise to the complaints in this case occurred under this version of the policy directive. The MDOC subsequently revised its policy. The current version of PD 03.02.130 (effective December 19, 2003) will be referenced in section II C of Respondents' brief. (Respondents' Appendix, *infra*, p 1b).

The grievance process involves three steps. The total exhaustion process must be completed within 90 days. (PD 03.02.130 ¶ V.). An inmate must first attempt to resolve the grievance within two business days verbally with the staff member involved "[U]nless prevented by circumstances beyond his/her control." (¶ T).

If the prisoner cannot resolve the grievance verbally, he may proceed to step I of the grievance system. Within five business days after attempting to verbally resolve the issue, the prisoner may submit a completed form to the grievance coordinator. (¶ Y). The grievance coordinator shall return a response to the prisoner within 15 days unless an extension has been granted. (¶ CC).

If the prisoner is dissatisfied with the step I response, the prisoner can submit a step II grievance. The step II grievance is due to the step II grievance coordinator within five business days after the prisoner receives his step I response. (¶ DD). The step II grievance shall be responded to and

returned within 15 business days unless an extension is granted. (¶ FF).

If the prisoner is dissatisfied with the step II response, the prisoner may file a step III grievance with the Director or the Director's designee within 10 days after receiving the step II response. (¶ GG). The step III response is the final step in the process.

The policy also permits prisoners to file grievances alleging racial or ethnic discrimination and staff brutality or corruption directly to step III along with grievances regarding the prisoner's removal as a housing unit representative.

Williams v Overton (05-7142)

Petitioner Timothy Williams,[1] a Michigan prison inmate, is currently serving a sentence of fifteen to twenty-five years for armed robbery and assault with intent to rob armed. He is also serving an additional mandatory two-year consecutive sentence for using a firearm in the commission of a felony.

Williams suffers from a medical condition in his right arm known as "noninvoluting cavernous hemangiomas" which causes tumors to grow and results in disfigurement. On March 3, 2002, Dr. Raymond Noellert, a contract physician with Correctional Medical Services, recommended that Williams have surgery to remove the tumors and to straighten his wrist.

Pramstaller and Dr. Rocco DeMasi of Correctional Medical Services denied Dr. Noellert's recommendation on March 26, 2002, because the danger of the surgery outweighed the benefits. They believed that the surgery was purely cosmetic. On March 26, 2002, Williams appealed the denial.

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[1] Timothy Williams, Prisoner No. 173396. The MDOC website can be found at http://www.state.mi.us/mdoc/asp/otis2.html.

Williams pursued his request for surgery using two different channels. First, Dr. J. Hoffman asked for another referral that Dr. Pramstaller and Dr. DeMasi denied. Second, he appealed the denial through the administrative grievance process. Pramstaller and DeMasi denied Dr. Hoffman's request on April 8, 2002.

Williams filed a step I administrative grievance regarding the denial of the surgery on June 7, 2002. (JA II, p 9). The Medical Services Advisory Committee subsequently denied his request for surgery a second time on July 25, 2002.[2] Williams then appealed that decision in steps II and III of the grievance process. Michigan Department of Corrections officials denied his grievance at both steps II and III. (JA II, pp 14-15). Williams did not name any of the Respondents at any step of the grievance process.

Williams requested placement in a handicapped-accessible single cell on August 13, 2002. On August 20, 2002, Williams filed a grievance against Respondent Jamrog in which he requested a single-cell accommodation. (JA II, p 20). Tom Bell, the Deputy Warden, denied his grievance on September 12, 2002. Williams ultimately appealed the denial of his request through steps II and III. Prison officials denied his requests at the next two steps. Neither of these grievances referred to any of the Respondents.

Williams did get placed in a handicapped-accessible cell on September 9, 2002. Respondent Pass also authorized another prisoner to assist him in certain tasks on September 9, 2002. But prison officials removed him from the handicapped-accessible cell and denied him the use of a prisoner-assistant on September 10, 2002, because he failed to provide any medical documentation that he qualified for a single cell or that he

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[2] The Medical Services Advisory Committee is composed of physicians from the Michigan Department of Corrections and Correctional Medical Services, a private health maintenance organization.

needed an assistant. Williams then filed step I grievances naming Respondents Klee, Markwell, Pass, and Peterson. Williams alleged in his grievances that Markwell and Klee conspired together to remove him from his handicapped-accessible cell. He claimed that Pass and Peterson did not accommodate his disability as required by the Americans with Disabilities Act (ADA) and the Rehabilitation Act (RA) by returning him to a handicapped-accessible cell after September 10, 2002.[3] Prison officials denied his grievances at all three levels as to Klee, Markwell, Pass, and Peterson.

Williams filed suit in the United States District Court for the Eastern District of Michigan alleging that Respondents Jamrog, Klee, Markwell, Pass, Peterson and Overton violated his constitutional and statutory rights under the Eighth and Fourteenth Amendments and the ADA and the RA by denying him authorization for surgery and denying him placement in a handicapped-accessible cell. At the time he filed his federal court complaint Williams was housed at the Gus Harrison Correctional Facility (ARF) in Adrian, Michigan. Petitioner Williams had not exhausted all of his administrative remedies against all of the Respondents as is required by the Prison Litigation Reform Act (PLRA).[4]

The Respondents filed a dispositive motion arguing that Williams failed to exhaust his administrative remedies. The Magistrate Judge concluded in the Report and Recommendation (R&R) that Williams failed to name any of the Respondents in his claim regarding the denial of his medical procedure during the administrative appeals process and therefore he failed to exhaust his administrative remedies. (JA I, p 76). Since he failed to name all of the Respondents in the administrative process, he had only partially exhausted his administrative remedies. Accordingly, the Magistrate Judge concluded the entire matter should be dismissed without

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[3] 29 USC § 701, *et seq.*; 42 USC § 12101, *et seq.*

[4] 42 USC § 1997e(a).

prejudice. The Magistrate Judge also recommended dismissing the case on the merits.

The District Court adopted the portion of the R&R that dismissed the action based on Williams's failure to exhaust his administrative remedies pursuant to the PLRA. (JA I, p 106). The District Court did not address the portion of the R&R that dealt with the issues on the merits. Williams filed a timely appeal on November 14, 2003.

The Court of Appeals affirmed the District Court based on Williams's failure to name the individuals he intended to sue in his grievance regarding his request for surgery in the administrative appeals process.[5] (JA I, p 110). The Court of Appeals concluded that his failure to name all of the Respondents constituted partial exhaustion of his administrative remedies. Previously, in *Jones Bey v Johnson*, the Court of Appeals had held that if a prisoner had only partially exhausted his claim, then the entire complaint had to be dismissed without prejudice.[6]

Walton v Bouchard (05-7142)

Petitioner John Walton,[7] a Michigan prison inmate, is currently serving a sentence of four to twenty years for delivery of narcotics. He is also serving a mandatory consecutive two-year sentence for possessing a gun during the commission of a felony.

On July 17, 2001, Respondent Gearin put Walton on an indefinite "upper slot restriction" for assaulting a corrections officer. The upper slot restriction required that he could only receive food and paperwork through a lower food slot of his

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[5] *Williams v Overton, et al*, unpublished per curiam opinion, No. 03-2507, 2005 US App Lexis 12277 (CA 6 June 22, 2005).

[6] *Jones Bey v Johnson*, 407 F3d 801, 805 (CA 6 2005).

[7] John Walton, Prisoner No. 173849. The MDOC website can be found at http://www.state.mi.us/mdoc/asp/otis2.html.

cell door. Walton subsequently filed a grievance on April 16, 2002, against Respondent Bobo. Walton alleged in his grievance that white prisoners received, at most, a 60-day suspension for similar conduct. His grievance was only directed at Respondent Bobo. Respondent Gerth responded to the grievance by indicating that ADW Gearin had placed him on the upper slot restriction. Gerth's response dated April 26, 2002, explained that prison discipline is imposed on an individual basis.

Walton appealed his grievance through steps II and III. Bobo is the only person Petitioner Walton named in his step II and III grievances. Prison officials denied his grievances at both steps.

Walton, an African-American prison inmate, brought suit in the United States District Court for the Western District of Michigan against Respondents Bouchard, Gearin, Bergh, Bauman, Bobo, and Gerth pursuant to 42 USC § 1983 alleging racial discrimination under the Fourteenth Amendment. Petitioner Walton did not exhaust his grievances against anyone other than Bobo prior to filing suit.

The Magistrate Judge issued an R&R recommending dismissal based on Petitioner Walton's failure to exhaust his administrative remedies. (JA I, p 158). The Magistrate Judge found that Walton had not exhausted his administrative remedies against Bouchard, Gearin, Bergh, Bauman, or Gerth.

The adopted the R&R and applied the total exhaustion rule, prior to the Court of Appeals' decision in *Jones Bey*, and dismissed the case without prejudice. (JA I, p 165). The total exhaustion rule requires prisoners, during the administrative process, to exhaust all of their claims against all of the parties they intend to sue. [8] Failure to do so requires the District Court to dismiss the action in its entirety without prejudice. The

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[8] *Jones Bey*, 407 F3d at 809.

District Court found Walton had not named each of the Respondents in his grievances. Consequently, he had only partially exhausted his administrative remedies. Walton filed a timely Notice of Appeal on October 29, 2003.

The Court of Appeals affirmed, citing its decisions in *Curry v Scott* and *Jones Bey*.[9] (JA I, p 168).[10] In its decision, the Court of Appeals ruled that Walton had only named Bobo in his grievances. Thus, he had only partially exhausted his administrative remedies.

Jones v Bock (05-7058):

Lorenzo Jones,[11] a Michigan prison inmate, is currently serving concurrent sentences of fifteen to thirty years for armed robbery and first degree criminal sexual conduct. He is also serving an additional mandatory two-year consecutive sentence for using a firearm in the commission of a felony.

Inmate Lorenzo Jones is an inmate under the jurisdiction of the Michigan Department of Corrections. He was incarcerated at the Saginaw Correctional Facility at the time at issue.

On September 15, 2001, Jones filed a step I grievance against Opanasenko, Health Care, Classification Director, Deputy Warden, and the Warden stating that he could not do certain of his work assignment duties, which Opanasenko required him to do. (JA II, p 2). Jones stated he was wearing a neck brace and walking with a cane, due to an automobile accident in November 2000. Jones claimed Opanasenko, Classification Director, Deputy Warden, Health Care and the Warden were all aware of his current conditions. Jones's work

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[9] *Curry v Scott*, 249 F3d 493, 503 (CA 6 2001); *Jones Bey*, 407 F3d at 805.
[10] *Walton v Bouchard, et al*, unpublished per curiam opinion, No. 03-2458, 2005 US App Lexis 11991 (CA 6 June 17, 2005).
[11] Lorenzo Jones, Prisoner No. 176204. The MDOC website can be found at http://www.state.mi.us/mdoc/asp/otis2.html.

evaluation form contained a statement indicating Jones wrote: "I would like to be removed from this detail." Jones asserted he did not write that comment. The grievance further indicates Jones was walking with a cane and wearing a neck brace at the time of the incident.

Jones's step I grievance further indicates Opanasenko, Health Care, Classification, Deputy Warden, and Warden knew or should have known that by requiring Jones to work beyond his physical capabilities, they were violating the First, Eighth, and Fourteenth Amendments to the Constitution. He also indicated that qualified immunity should not shield the defendants because his rights were clearly established and should have been known to a reasonable person. Jones's step I grievance indicated he would suffer harm if the negative work evaluation remained in his file, when he went before the parole board. The grievance also indicates he was cleared by Health Care for such a job. The grievance claims that Opanasenko threatened to write a misconduct ticket against Jones when Jones refused to pick up some equipment, but that Opanasenko did not do so. Jones claimed Opanasenko did not like him and "harassed" him by insisting that he pick up equipment and hand it to other inmates. Jones asks for five specific remedies, one of which is that he not be required to work until cleared by "personal outside doctor's" [sic]. Jones's only mention of "retaliation" was in his request for relief where he asked that none of the "above named defendants" their agents or co-workers should take "retaliatory actions" against him.

Notable for their absence from the step I grievance are (1) any claim that Jones suffered any injury or aggravation of any condition or injury as a result of carrying out his duties (2) any mention that he was wearing a leg or foot brace at the time of the incident; (3) any claim that he had not been medically cleared for the work assignment.

The step I grievance response indicates the negative work evaluation Jones complains of is appropriate and denies him any relief. (JA II, p 3).

Jones filed a step II grievance appeal arguing that the step I response did not address his claims against anyone but Opanasenko. (JA II, p 4).

Warden Bock's step II response notes that "Health care verified that his medical condition does not preclude him from handing out recreation equipment," and that Health Care confirmed that Jones "was physically capable of working this assignment." (JA II, p 5). Warden Bock's response also indicates that Classification assigned Jones to the equipment handler work assignment because it was a "light duty" assignment appropriate for his medical condition. Warden Bock's response notes that the work evaluation was defective in that it was signed twice by the reporting officer, but not by his supervisor. The evaluation would be removed from Jones's file, but the officer may re-write it and have his supervisor sign it. Warden Bock's response further reminded staff that the evaluation forms must be signed by a supervisor before processing them through Classification.

Jones filed a step III appeal, claiming health care at that particular prison, "SRF" (the initials that are shorthand for Saginaw Correctional Facility) had not examined him to make a detail of his injuries. (JA II, pp 6-7). He also indicated prison officials denied him his First, Eighth, and Fourteenth Amendment rights to be "free of activities that Plaintiff **may or may not** be physically capable of performing." (JA II, p 7, emphasis added). Jones complains his issues have not all been addressed.

On December 11, 2001, the step III response indicates the responses at steps I and II adequately address the merits of the main issue grieved and denied, confirmed the work evaluation had been re-written and inserted in his file while the

defective work evaluation had been removed. (JA II, p 8). The response indicated the grievance had been resolved.

On November 15, 2002, Jones filed his complaint in the United States District Court for the Eastern District of Michigan, suing the State of Michigan; the Michigan Department of Corrections; Warden Bock; Deputy Warden of Programs, Chaplin; Classification Director Morrison; Correctional Officer Opanasenko; and Health Care Jane Doe and John Doe. (JA I, p 7). Jones claims he suffered injuries in an automobile accident in November 2000, which required surgery. In July 2001, Jones claims Classification Director Paul Morrison assigned him to a work assignment handing out exercise equipment. Jones claims Morrison knew of his condition and knew Jones was unable to perform the work assignment. Jones alleged that Officer Opanasenko told him he was faking his condition and to do his assignment or he would be written a misconduct ticket.

Jones's complaint claims he did perform his duties and, for the first time, Jones claims he re-injured and aggravated injuries to his back, shoulders and neck. Jones claims he was wearing a neck brace, leg brace, walking with a cane, and on pain medication when this incident occurred. Jones claims each defendant failed to comply with their duty to keep Jones from being placed in a position that exposed him to serious risk of serious injuries, and knew or should have known that Jones was physically unable to perform the work assignment. Jones also alleges Opanasenko harassed him by threatening to write a misconduct ticket for Jones's staring at him in a threatening manner. Jones claims he was walking "with a cane and had a foot and neck brace on and suffered paralysis on the left side of [his] body. Jones also alleged Opanasenko retaliated against him by writing an evaluation form indicating Jones was a poor worker and when Jones told Opanasenko he could not perform his duties, he "appeared to be threaten." Jones alleged violations of his First, Eighth and Fourteenth Amendment rights under the United States Constitution. Jones also alleged

torts of infliction of emotional distress and physical pain and suffering.

In his complaint, Jones alleges at paragraph 3 that he exhausted all available administrative remedies. He provides the precise dates that he filed a grievance at each step of the three-step process. But he does not explain how the grievance was resolved, what issues were raised in the grievance, who he filed the grievance against, or why he did not attach copies of the grievance documents.

On November 19, 2002, the District Court issued an initial order, dismissing the State of Michigan and Michigan Department of Corrections and ordering service on the rest of the Defendants. The order also informed Jones that he had 60 days to identify the John Doe and Jane Doe. This order did not mention exhaustion of administrative remedies.

On January 10, 2003, within ten days of the appearance by Opanasenko, Bock, Chaplin and Morrison, and before discovery, Jones filed a motion (JA I, p 1, docket entry 11) to name Jane Doe as Janet Konkle, RN and John Doe as Ahmad Aldabagh, M.D. On January 17, 2003, the court granted that motion. (JA I, p 1, docket entry 13). The record does not reflect service of process on Konkle or Aldabagh.

As the Magistrate Judge related, Defendants responded to the complaint with a motion to dismiss based on Jones's failure to exhaust administrative remedies. (JA I, p 18, 29 n. 4). Attaching Jones's pertinent grievance and the responses at all three steps, Defendants argued that Jones had not exhausted all administrative remedies with respect to the allegations of his complaint. They argued total exhaustion required the court to dismiss the entire complaint.

In his Report and Recommendation, the Magistrate Judge advised the court to dismiss the claims against Bock, Chaplin, Konkle and Aldabaugh. He further opined that total

exhaustion was not required. While law in the Sixth Circuit held a plaintiff could not amend the complaint to show exhaustion, where the defendant submitted the pertinent grievance forms, that issue did not come into play. Here, by the time the Magistrate Judge reviewed the case, the grievance forms were available to him and he could use them to decide whether the plaintiff had exhausted administrative remedies. The Magistrate Judge rejected the Defendants' argument that the grievance exhausted only Jones's claims against Opanasenko for a negative work evaluation. He held that Jones had sufficiently exhausted his claims against both Opanasenko the Classification Director Morrison.

On September 25, 2003, the District Court adopted the recommendation to dismiss Bock, Chaplin, Konkle and Aldabaugh, but rejected the recommendation with respect to Opanasenko and Morrison. (JA I, p 40). The District Court recognized that the PLRA establishes a unique procedure under which the court is required to evaluate whether there is a claim upon which relief can be granted set forth in the complaint. In order to effective screen cases, the court acknowledged, the initial complaint must stand or fall on its own. Based on the failure to state a claim upon which relief can be granted, the court dismissed the complaint. The judge noted that she did not need to reach and did not decide the Defendants' total exhaustion argument.

Jones appealed on November 26, 2003. (JA I, p 4, docket entry 42). In response, on April 12, 2004, the Michigan Attorney General's Office filed a letter with the Court of Appeals informing the Court that due to limited resources during the fiscal crisis, as well as the increasing workload, the Attorney General's Office lacked sufficient resources to file briefs in cases such as this one. (JA I, p 5, docket entry 4/14/04). The Appellees would rely on the record below.

On April 27, 2005, the Court of Appeals issued its decision in *Jones Bey v Johnson,* joining the Eighth and Tenth Circuits in recognizing the total exhaustion rule.[12]

On June 15, 2005, the Court of Appeals issued its *per curium* decision in the instant case affirming the District Court. (JA I, p 44). The Court of Appeals recognized that the PLRA requires inmate to exhaust all administrative remedies before bringing an action in federal court. The Court relied on *Jones Bey*, holding that pursuant to the total exhaustion requirement, where a single claim remains unexhausted, the entire complaint must be dismissed. The Court also held that to meet the PLRA's exhaustion requirement, the inmate is required to either attach a copy of his prison grievance forms to the complaint, or state the nature of the remedies pursued and the outcome of each process. While Jones alleged conclusorily that he exhausted administrative remedies, he did not attach his grievance and responses or explain the remedies he pursued and the results. The Prison Officials' provision of documentation that Jones may have exhausted some claims was deemed irrelevant, because Jones did not show he exhausted all of his claims.

Jones filed a petition for writ of certiorari on October 13, 2005, which this Court granted on March 6, 2006.

As of June 6, 2006 when *Spencer v Bouchard* issued, panels of the Court of Appeals for the Sixth Circuit are in a dispute as to whether total exhaustion or partial exhaustion is recognized in the Sixth Circuit.[13] This Court's decision will settle the issue, as to which there is conflict among the Circuits and within the Sixth Circuit.

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[12] *Jones Bey v Johnson*, 407 F3d 801 (CA 6 2005).
[13] *Spencer v Bouchard*, 449 F3d 721 (CA 6 2006).

SUMMARY OF THE ARGUMENT

The PLRA ushered in new regime for federal litigation brought by prisoners. Requiring total exhaustion, heightened pleadings and identifying parties in prisoner grievances all comport with the purposes of the PLRA to decrease the number and increase the quality of prisoner lawsuits. Congress enacted the PLRA due to the outsized consumption of judicial resources prisoner lawsuits garner, resulting in fewer judicial resources devoted to all meritorious litigation. These PLRA requirements also serve comity, allowing the States the first opportunity to address inmate's concerns. This recognizes the unique expertise of prison officials in dealing with prisoner's issues. These PLRA provisions result in creation of an administrative record that is useful to the court if litigation results. And they diminish piecemeal litigation and otherwise serve judicial economy.

No fewer than three sections of the statute require judicial screening. The PLRA also includes the proviso that the court may require a defendant to respond to the complaint only if the court finds that the plaintiff has a reasonable opportunity to prevail on the merits. This is a more demanding standard than even the requirement to state a claim upon which relief can be granted. For this requirement to have meaning, heightened pleadings that demonstrate exhaustion as to all defendants are mandatory. Without the inmate pleading and showing that exhaustion of administrative remedies is complete as to all defendants, the court cannot make the determination that the inmate has a reasonable opportunity to prevail on the merits.

The Court of Appeals correctly held that prisoners must name or identify particular defendants in their grievances in order to exhaust administrative remedies as to those defendants and preserve the right to sue them. This requirement is consistent with the plain language of the statute because it

creates the administrative record necessary to determine whether the inmate exhausted all administrative remedies.

Moreover, this Court held the PLRA requires prisoners to properly exhaust claims. Proper exhaustion requires prisoners to comply with the administrative requirements. The Michigan Department of Corrections grievance policy requires inmates to be specific in their grievances. Naming, or at least identifying, the corrections officials is an element of that specificity. Current MDOC policy does explicitly require prisoners to name in their grievances those they intend to sue. *Woodford v Ngo* therefore requires proper exhaustion: identifying the alleged wrongdoers and exhausting administrative remedies as to them before filing a suit in federal court.[14]

The PLRA embodies a total exhaustion requirement. Section 1997e(a)'s provision that "no action shall be brought" by a prisoner, prior to exhaustion of administrative remedies, requires the inmate to exhaust all remedies or suffer dismissal of the entire action. As this Court recently held in *Woodford v Ngo,* " . . . saying that a party may not sue in federal court *until* the party first *pursues* **all** available avenues of administrative review necessarily means that if the party never pursues **all** available avenues of administrative review, the party will never be able to sue in federal court."[15] If a remedy remains unexhausted as to even a single claim or defendant, then the plaintiff did not exhaust all available remedies, and the PLRA requires dismissal.

Other portions of the PLRA are consistent with this result. Section 1997e(c)(1) requires the court to dismiss entire actions if the action is meritless. Section 1997e(c)(2) permits the court, if it chooses, to dismiss meritless claims, regardless

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[14] *Woodford v Ngo*, 548 US __; 165 L Ed 2d 368; 126 SCt 2378, 2388 (2006).

[15] *Woodford*, 126 SCt at 2391 (italics in original; bold emphasis added).

of exhaustion. These provisions give the court the option to dismiss entire actions that cannot succeed and should not be brought again, regardless of exhaustion. The three provisions also give the court the options of dismissing the entire action if any claim remains unexhausted, or, if judicial economy is better served, to dismiss with prejudice particular meritless claims without being required to determine whether the inmate completed exhaustion as to them.

Finally, in several ways the habeas corpus statute informs the PLRA total exhaustion requirement. This Court recognized the habeas corpus provision requiring total exhaustion in 1982 in *Rose v Lundy*.[16] This decision was well-known to Congress when it drafted the PLRA in 1995. The PLRA scenario is, in some respects, parallel to the habeas corpus statute, which also requires heightened pleadings and judicial screening. Habeas corpus law requires inmates to exhaust state remedies prior to filing a petition, while the PLRA mandates that inmates exhaust before filing an action. Under the PLRA's new regime, as under habeas corpus law, notice pleading gives way to the more specific statutes that govern these unique areas of prisoner civil litigation. Some general provisions of traditional notice pleading rules that conflict with the new more specific PLRA regime, must yield.

[16] *Rose v Lundy*, 455 US 509 (1982).

ARGUMENT

I. The PLRA instituted a "new regime" for inmates challenging prison conditions, requiring exhaustion of administrative remedies and imposing the requirements to plead and demonstrate exhaustion as to all defendants.

The Prison Litigation Reform Act (PLRA) changed the procedures for processing litigation brought by prisoners with respect to prison conditions. As this Court held, the PLRA instituted a "new regime."[17] The Court of Appeals in the cases at hand correctly applied the PLRA and dismissed the complaints without prejudice.

A. The plain text of the PLRA establishes a new regime that imposes a heightened pleading standard.

The PLRA's judicial screening requirements, in combination with the mandate to exhaust administrative remedies prior to bringing suit,[18] imposes a heightened pleading standard on prisoner litigators, requiring them to demonstrate exhaustion as to all defendants.

The PLRA's heightened pleading requirement rests on no fewer than three judicial screening provisions: 28 USC § 1915(e)(2), 28 USC § 1915A, and 42 USC § 1997e(c).

First, 28 USC § 1915(e)(2) requires dismissing the case at any time under the circumstances enumerated:

> (2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the

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[17] *Porter v Nussle*, 534 US 516, 525 (US 2002).
[18] 42 USC § 1997e(a).

court shall dismiss the case at any time if the court determines that—

(A) the allegation of poverty is untrue; or
(B) the action or appeal--

(i) is frivolous or malicious;
(ii) fails to state a claim on which relief may be granted; or
(iii) seeks monetary relief against a defendant who is immune from such relief.

Second, 28 USC § 1915A requires the court to screen the case even before docketing, if feasible:

§ 1915A. Screening

(a) Screening. The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.

(b) Grounds for dismissal. On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint—

(1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or
(2) seeks monetary relief from a defendant who is immune from such relief.

Third, 42 USC § 1997e(c) requires the court to dismiss the action and allows it to dismiss individual claims for the specified reasons:

> (c) Dismissal.
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> (1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 USC § 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.
>
> (2) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.

And the waiver of answer provision is a fourth direction to the courts to screen early and often.[19]

These PLRA screening requirements are an "invigorated"[20] version of a prior law. The prior law, 42 USC § 1997e(a)(1) contained a weak exhaustion provision that gave district courts discretionary authority to stay actions for a limited time pending exhaustion.[21] Also, under the earlier

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[19] 42 USC § 1997(g).

[20] See *Porter v Nussle*, 534 US 516, 524 (2002)(recognizing the PLRA provides an "invigorated" exhaustion prescription).

[21] *Woodford*, 126 SCt at 2382.

statute, provision 28 USC § 1915(d), permitted courts to dismiss a claim filed *in forma pauperis* "if . . . satisfied that the action is frivolous or malicious." As construed in *Neitzke v Williams*[22] and *Denton v Hernandez*,[23] the courts had discretion to conduct *sua sponte* screening under 28 USC § 1915(d). Further, the statute allowed dismissal only if the court ruled the action malicious or frivolous. The courts had no discretion to dismiss for failure to state a claim.

The PLRA strengthened *sua sponte* screening in several ways. First, judicial screening is now mandatory.[24] Second, actions must be dismissed not only if frivolous, but also if malicious, if they fail to state a claim upon which relief can be granted, or if they seek money damages from someone with immunity.[25] The PLRA emphasized the mandatory nature of judicial screening by addressing a unique provision in 42 USC § 1997e(g) permitting any defendant to "waive the right to reply to any action." This section prohibits the court from granting any relief "unless a reply has been filed," but a court may not require a reply unless "it finds that the plaintiff has a reasonable opportunity to prevail on the merits."

The PLRA provisions build on *Neitzke's* interpretation of the prior law that, *Neitzke* said, gave district courts "the unusual power to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless."[26] *Neitzke* carefully noted the function of this type of provision. "Section 1915(d) is designed largely to

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[22] *Neitzke v Williams*, 490 US 319, 324 (1989)(recognizing dismissals for frivolousness under 28 USC § 1915(d) were "often made" sua sponte to spare defendants expense and inconvenience).

[23] *Denton v Hernandez*, 504 US 25 (1992)("The [in forma pauperis] statute protects against abuses of this privilege by **allowing** a district court to dismiss the case 'if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.' § 1915(d).").

[24] 42 USC § 1997e(a); 28 USC § 1915(e)(2); 28 USC § 1915A; and 42 USC § 1997e(g)(2).

[25] 42 USC § 1997e(c)(1).

[26] *Neitzke*, 490 US at 327.

discourage the filing of, and waste of judicial resources upon, baseless lawsuits that paying litigants generally do not initiate because of the costs of bringing suit and because of the threat of sanctions for bringing vexatious suits."[27]

The statute allows defendants to waive an answer and prevents the court from authorizing service of process on a defendant unless the court first certifies that the inmate has a reasonable opportunity to prevail on the merits.[28] Looking at the statute as a whole and in light of Congress's intent in enacting the statute demonstrates that exhaustion of administrative remedies is a pleading requirement and not an affirmative defense.

The first step in the task of interpreting a statute "is to determine whether the language at issue has a plain and unambiguous meaning."[29] But courts cannot determine whether a statute has a plain and unambiguous meaning by looking at the language in isolation. Instead, the court must consider "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."[30] As this Court stated "'In expounding a statute, we must . . . look to the provisions of the whole law, and to its object and policy.'"[31]

As the Court of Appeals noted in *Baxter v Rose,* the PLRA sets up a unique screening process that puts the burden on the courts to determine whether the complaint states a claim upon which relief can be granted, even before the complaint can be served on a defendant.[32] Section 1915A provides that district courts shall ". . . before docketing, if feasible or, in any event, as soon as is practicable after docketing," screen

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[27] *Neitzke*, 490 US at 327.
[28] 42 USC § 1997e(g).
[29] *Robinson v Shell Oil Co*, 519 US 337, 340 (1997).
[30] *Robinson*, 519 US at 341.
[31] *Philbrook v Glodgett*, 421 US 707, 713 (1975)(citations omitted).
[32] *Baxter v Rose*, 305 F3d 486, 490 (CA 6 2002).

prisoner complaints against governmental officials or entities to determine, among other things, whether they state claims on which relief may be granted.[33] The courts would be prevented from efficaciously screening cases if the plaintiffs could, through obscure pleading, circumvent the PLRA requirement to show a reasonable opportunity to prevail on the merits or face dismissal without prejudice prior to service of process.[34]

The *Baxter* decision relied on by the Court of Appeals here is supported by opinions of this Court. In *Porter v Nussle*, this Court ruled that exhaustion of administrative remedies is required for all prisoner litigation, stating: ". . . exhaustion is a prerequisite to suit."[35] Further, this Court opined that Congress intended the PLRA to upgrade the caliber of prisoner litigation: "Beyond doubt, Congress enacted § 1997e(a) to reduce the quantity and **improve the quality** of prisoner suits; to this purpose, Congress afforded corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case."[36] And this Court recognized that "the PLRA establishes a different regime."[37] This Court further held that one of the PLRA's "dominant concern[s]" is to "foster better prepared litigation of claims aired in court."[38]

B. The flood of inmate litigation in federal courts prompted Congress to enact the PLRA.

For most of the history of the Republic prisoners had few if any constitutional rights cognizable in the courts. The "hands-off" doctrine prevailed well in to the middle part of the twentieth century.[39] Under the hands-off doctrine federal courts would rarely, if ever, review prisoner civil rights

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[33] 28 USC § 1915A.
[34] 42 USC § 1997e(g).
[35] *Porter*, 534 US at 524.
[36] *Porter*, 534 US at 524-25 (emphasis added).
[37] *Porter*, 534 US at 525.
[38] *Porter*, 534 US at 528.
[39] Mushlin, *Rights of Prisoners, Third Edition (2002), Vol 1*, p 14.

complaints on the merits. This Court only explicitly recognized that prisoner cases should be addressed on the merits in 1974.[40] Congress enacted 28 § USC 1915(d) the precursor to the PLRA in an attempt to deal with the heavy burden that prison litigation imposed on the courts.

In 1989 in *Neitzke v Williams,* a unanimous Court characterized the role of 28 USC § 1915(d)[41]:

> Section 1915(d) is designed largely to discourage the filing of, and waste of judicial and private resources upon, baseless lawsuits that paying litigants generally do not initiate because of the costs of bringing suit and because of the threat of sanctions for bringing vexatious suits under Federal Rule of Civil Procedure 11.

This Court also described how the flood of baseless lawsuits hindered the courts in addressing even meritorious claims[42]:

> We recognize the problems in judicial administration caused by the surfeit of meritless in forma pauperis complaints in the federal courts, not the least of which is the possibility that meritorious complaints will receive inadequate attention or be difficult to identify amidst the overwhelming number of meritless complaints.

In *Neitzke*, this Court held that since 1915(d) allowed dismissal of frivolous claims the Court of Appeals erred in sua sponte dismissing the claim for failure to state a claim upon which relief could be granted. Frivolous and failure to state a claim were not synonymous this Court decided. While this Court in

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[40] *Wolf v McDonnell*, 418 US 539, 555-56 (1974); *Procunier v Martinez*, 416 US 396, 405-06 (1974).
[41] *Neitzke*, 490 US at 327.
[42] *Neitzke*, 490 US at 327.

Neitzke felt constrained to reject these policy considerations because its role was "not to make policy, but to interpret a statute," [43] no such constraint is appropriate here because the PLRA was enacted in response to these policy considerations, and requires total exhaustion, judicial screening, and heightened pleadings. Since the PLRA specifically requires dismissal for failure to state a claim, Congress implemented *Neitzke's* policy concerns by statutory amendment.

C. The PLRA's legislative history supports total exhaustion and heightened pleadings.

Against the backdrop of the weak 28 USC § 1915(d) described in *Neitzke*, Congress, a few years later, crafted the current PLRA. Total exhaustion and heightened pleadings are stringent but necessary because they will reduce the "outsized share" of civil filings brought by prisoners.[44] The PLRA is intended to deal with a perceived "disruptive tide of frivolous prisoner litigation."[45] The policy concerns articulated in *Neitzke* were voiced during Congressional debates. "The crushing burden of these frivolous suits make it difficult for the courts to consider meritorious claims," Senator Hatch explained in one speech.[46] Senator Kyl explained the need for the statutory reform of mandatory exhaustion of administrative remedies by referring to a comment by Chief Justice Rehnquist in his dissent in *Cleavinger v Saxner*: "With less to profitably occupy their time than potential litigants on the outside, and with a justified feeling that they have much to gain and virtually nothing to lose, prisoners appear to be far more prolific litigants than other groups in the population."[47] And as

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[43] *Neitzke*, 490 US at 326.
[44] *Woodford*, 126 SCt at 2388.
[45] *Woodford*, 126 SCt at 2389.
[46] 141 Cong Rec S 14627 (daily ed Sept 29, 1995)(Statement of Senator Hatch).
[47] 141 Cong Rec S 7527 (daily ed May 25, 1995)(Statement of Senator Kyl); *Cleavinger v Saxner*, 474 US 193, 211 (1985)(Rehnquist, J. dissenting)(emphasis added).

Senator Kyl asserted: "If we achieve a 50% reduction in bogus federal prisoner claims, we will free up judicial resources for claims with merit by both prisoners and nonprisoners."[48] Professor Schlanger's exhaustive examination of prisoner filings supports this idea[49]:

> Inmates do indeed file a large number of cases compared to other litigants, and in 1996 those numbers had been increasing sharply. Those cases did indeed mostly fail. The system probably cost more to administer than the total amount of compensation it provided victims of tortious injury.

More specifically, Professor Schlanger notes the "extremely high" rate of prisoner filings in federal courts, in comparison to persons not incarcerated[50]:

> In 1995, for example, inmates filed federal civil rights cases at the rate of about 25 per 1000 inmates; non-inmates, in contrast, filed civil suits in federal court at a rate of about 0.7 per 1000 non-inmates. So, nationally, inmates filed about 35 times as frequently as non-inmates.

And, as this Court recognized, the flood continues[51]:

> [P]risoner civil rights and prison conditions cases still account for an outsized share of filings: From 2000 through 2005, such cases represented between 8.3% and 9.8% of the new filings in the federal district courts, or on

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[48] 141 Cong Rec S 19114 (daily ed Dec 21, 1995)(Statement of Senator Kyl).

[49] Schlanger, *Inmate Litigation*, 116 Harvard Law Review 1555, 1692 (2003).

[50] Schlanger, *Inmate Litigation*, 116 Harvard Law Review 1555 at 1575.

[51] *Woodford*, 126 SCt at 2386 n 2, 2388.

> average about one new prisoner case every other week for each of the nearly 1000 active and senior district judges across the country.

As noted by the Eleventh Circuit, in *Alexander v Hawk*, Congress amended section 1997e(a) largely in response to concerns about the heavy volume of frivolous prison litigation in the federal courts.[52] "Congress desired 'to wrest control of our prisons from the lawyers and the inmates and return that control to competent administrators appointed to look out for society's interests as well as the legitimate needs of prisoners.'"[53]

The costs to courts for handling prisoner litigation are substantial. Based on the estimate of the Federal Judicial Center, inmate cases filed in 1995 cost about 51 million dollars.[54] State costs are not insignificant either. During the PLRA debates, the National Association of Attorneys General estimated that the States' costs in 1995 were about 80 million dollars each year on inmate litigation.[55] These problems and issues prompted Congress to enact the PLRA.

D. Total exhaustion and heightened pleadings are consistent with the policies underpinning the PLRA.

The total exhaustion rule is consistent with the overall policies of the PLRA. As this Court recognized, "[I]t is beyond doubt that Congress enacted § 1997e(a) to reduce the quantity

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[52] *Alexander v Hawk*, 159 F3d 1321, 1326 n 11 (CA 11 1998)(citing 141 Cong Rec H 14078-02, *H 14105 (daily ed Dec 6, 1995)).

[53] *Alexander*, 159 F3d at 1326 n 11 (quoting 141 Cong Rec S 14408-01, *S14418 (daily ed Sept 27, 1995)).

[54] *See*, Schlanger, *Inmate Litigation*, 116 Harvard Law Review pp 1624-1625.

[55] *See*, Letter from NAAG to Senate Majority Leader Bob Dole, reprinted 141 Cong Rec S 14417 - S 14418 (daily ed Sept 27 1995); *See* Schlanger, *Inmate Litigation*, 116 Harvard Law Review at 1625.

and improve the quality of prisoner suits."[56] In *Woodford*, this Court emphasized again: "A centerpiece of the PLRA's effort 'to reduce the quantity . . . of prisoner suits' is an 'invigorated' exhaustion provision, § 1997e(a)."[57] The total exhaustion and heightened pleadings requirements satisfy the policy objectives of the Act in several ways.

1. Total exhaustion and heightened pleadings improve the quality and decrease the quantity of prisoner lawsuits.

Total exhaustion and heightened pleadings both improve the quality of the lawsuits, and decrease the quantity, since district courts can properly screen cases and do not have to sort through each allegation of each complaint to determine which claims are exhausted and which are unexhausted. A partial exhaustion interpretation would require courts to spend scarce judicial resources sorting through often voluminous records to determine which claims could proceed. As this Court is well aware, prisoner complaints are frequently lengthy, rambling, and devoid of any editorial judgment with respect to inclusion of claims ranging from valid to marginal to meritless. As the Third Circuit stated in *Nyhuis v Reno*[58]:

> Inmate-plaintiffs often file claims which are untidy, repetitious, and redolent of legal language. The very nature of such complaints necessitates that courts expend significant and scarce judicial resources to review and refine the nature of the legal claims presented.

The PLRA, as applied by the Court of Appeals here, requires the inmate to at least give enough thought to the allegations to assure that exhaustion of administrative remedies is complete

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[56] *Porter*, 534 US at 524.
[57] *Woodford*, 126 SCt at 2378, 2382.
[58] *Nyhuis v Reno*, 204 F3d 65, 74 (CA 3 2000).

for all claims, before requiring any defendant to respond to the complaint. Again, the question is whether prisoner plaintiffs or courts should bear the burden of sorting through the complaint to include only exhausted claims. The PLRA, recognizing that inmates have

2. Total exhaustion and heightened pleadings decrease piecemeal litigation.

The total exhaustion and heightened pleadings rules diminish piecemeal litigation.[59] If a prisoner were allowed to proceed on some claims and not others, the prisoner could bring a second lawsuit requiring the District Court to once again expend scarce judicial resources reviewing whether each and every claim in the new action to determine which claims, if any, are unexhausted and which are meritless. This could result in a series of lawsuits dealing with the same set of operative facts pending at different stages of discovery, and different procedural postures. Potentially different outcomes could raise consideration of complicated questions of issue and claim preclusion. Total exhaustion and heightened pleadings, in contrast, promote judicial efficiency because it is much more likely to result in a single action dealing with all claims arising out of the same set of operative facts. And since the dismissal for failure to comply with total exhaustion is necessarily without prejudice, the inmate has the opportunity to bring the action again, pleading only exhausted claims.

3. Total exhaustion and heightened pleadings support comity by giving State officials the first opportunity to address prisoner concerns.

As the Court of Appeals recognized in *Brown v Toombs,* a purpose of the PLRA is to promote comity: "The new statute has extensive benefits. It recognizes that it is

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[59] *Jones Bey*, 407 F3d at 808; *Ross v City of Bernalillo*, 365 F3d 1181, 1190 (CA 10 2004).

difficult to explain why we require full exhaustion in habeas corpus cases involving life and liberty, but allow direct access in prison rights cases under § 1983."[60]

Total exhaustion recognizes that prison problems are best addressed first by the States. As the Court stated in *Preiser*[61]:

> Since these internal problems of state prisons involve issues so peculiarly within state authority and expertise, the states have an important interest in not being bypassed in the correction of these problems. Moreover, because most potential litigation involving state prisoners arises on a day to day basis, it is most efficient and properly handled by the state administrative bodies and the state courts, which are for the most part, familiar with the grievances of state prisoners and in a better physical and practical position to deal with these grievances.

The total exhaustion and heightened pleadings rules have collateral effects that support the policy objectives of the statute by encouraging prisoners and prison officials to make full use of the prison grievance procedure.[62] Congress intended that prison officials, not the Federal courts, have the first opportunity to resolve a prisoner's complaints.[63] The Federal courts must be the last step, not the first step, when a prisoner has a conflict with prison officials. The total exhaustion rule maximizes the incentive for prisoners to make use of the grievance process, and to avoid litigation altogether. Similarly, the heightened pleadings rule forces inmates to get their claims in order and demonstrate exhaustion before filing a complaint

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[60] *Brown v Toombs*, 139 F3d 1102, 1103 (CA 6 1998).
[61] See *Preiser v Rodriguez*, 411 US 475, 491-92 (1973).
[62] *Jones Bey*, 407 F3d at 807; *Ross*, 365 F3d at 1190.
[63] *Jones Bey*, 407 F3d at 807.

in federal court. In these ways these rules improve the quality of lawsuits.

And these rules aid the federal courts by ensuring that there is a full administrative record to review for each of the prisoner's claims.[64] By requiring total exhaustion of all claims, the PLRA ensures that the inmate has pursued all avenues of relief available at the administrative level, for all claims against all defendants. This makes available to the court a complete administrative record. And heightened pleadings make feasible the necessary judicial screening prior to service.

E. Where court rules conflict with the later-enacted PLRA, the PLRA controls.

To the extent that the pre-screening and mandatory exhaustion requirements of the PLRA conflict with the general procedures embodied in Federal Rules of Civil Procedure 8, 9 and 15, the PLRA controls. An analysis of the PLRA and F R Civ P 8, 9, and 15 demonstrates that the Court of Appeals properly dismissed the instant cases without prejudice.

Congress delegated rule-making authority to this Court. But Congress may still enact and has in fact enacted, Rules of Practice and Procedure or Evidence directly.[65] And Congress can enact statutes that supersede pre-existing rules[66]:

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[64] *Jones Bey*, 407 F3d at 807; *Ross*, 365 F3d at 1190.

[65] *See* the direct Congressional changes to the Federal Rules of Evidence in 1994. Pub L No 103-322, Title XXXII, §§ 320935(a), 320935(e) and Title IV, § 40141(b), 103d Congress, September 13, 1994; *see also* Fed R Evid 412-415.

[66] *1 Moore's Federal Practice* § 1.06 (Matthew Bender 3d ed). See e.g., *Traverse Bay Area Intermediate School Dist v Hitco, Inc*, 762 F Supp 1298, 1301 (WD Mich 1991) and *United States v Sharon Steel Corp*, 681 F Supp 1492, 1495-96 (D Utah 1987), holding that the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 USC § 9601, *et seq*, provision that defines "corporation" supersedes F R Civ P 17(b) for purposes of a CERCLA action against a dissolved corporation. But see e.g., *United States v Gustin-Bacon Div Certain-Teed Prod Corp*,

> Congress has plenary power to adopt a statute that supersedes an existing rule. If an inconsistent statute is enacted after the effective date of a rule, the statute takes precedence and is deemed to supersede or modify the conflicting rule, provided that the congressional intent is clear. If it is unclear, the courts will strive to construe the statute in harmony with the rule to the extent possible.

In *Crawford Fitt Co v JT Gibbons, Inc,*[67] this Court addressed a conflict between statutory provisions and a court rule. The petitioners who won a directed verdict filed a bill of costs seeking reimbursement from the respondent for expert witness fees petitioners had paid. The district court awarded them only $30.00 per day citing 28 USC § 1920 and 28 USC § 1821. Petitioners argued that Federal Rule of Civil Procedure 54(b) gave the court the discretion to award costs in excess of the statutory limits. This Court read the statute and the court rule in harmony, holding that the court rule gave the court discretion as to whether to award costs at all, but that the statute embodied the limits on the amounts the court could, in its discretion, award. In rejecting the petitioner's interpretation of the court rule that would have rendered the statute superfluous, this Court stated: "We cannot accept an interpretation of Rule 54(d) that would render any of these specific statutory provisions entirely without meaning."[68] Importantly, in analyzing how to reconcile the statutes with the court rule, the *Crawford Fitt Co.* decision relied on principles of statutory interpretation and held that the more specific

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426 F2d 539, 542 (CA 10 1970), *cert denied*, 400 US 832 (1970)(holding that the Civil Rights Act of 1964 did not supersede F R Civ P 8 on pleadings).

[67] *Crawford Fitt Co. v J.T. Gibbons, Inc,* 482 US 437 (1987).

[68] *Crawford Fitt Co,* at 442.

statute controlled, rather than the more general court rule stating[69]:

> As always, "'where there is no *clear* intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.'" *Radzanower v Touche Ross & Co*, 426 US 148, 153 (1976), quoting *Morton v Mancari*, 417 US 535, 550-551 (1974) (emphasis added).

Based on this analysis, in the instant cases, to the extent that there is a conflict, the more specific PLRA statutory provisions control, rather than the more general court rule. The PLRA's unique requirements for pre-service judicial screening and mandatory exhaustion, conflict with general provisions of Federal Rules of Civil Procedure 8, 9 and 15. Under these circumstances, the PLRA controls.

Similarly, in *Radzanower v Touche Ross & Co*, this Court addressed repeals by implication when construing two statutes recognizing a "cardinal rule" of statutory construction is that repeals by implication are disfavored, but *Radzanower* recognized that there are two categories of repeals by implication[70]:

> "(1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act."

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[69] *Crawford Fitt Co*, at 445 (emphasis in Crawford).
[70] *Radzanower v Touche Ross & Co*, 426 US 148, 154 (1976).

In the instant cases the PLRA does cover the whole subject of Rule 9, since the statute has a unique provision allowing defendants to waive a reply and requiring the court to determine whether the prisoner has a reasonable opportunity to prevail on the merits, prior to requiring defendants to respond to the complaint. The standard acknowledged by this Court in *Kremer,* "an implied repeal must ordinarily be evident from the language or operation of a statute," is clearly evident in the PLRA.[71]

Additionally, lower courts have consistently ruled that the Rules Enabling Act's suppression clause[72] provides that subsequent procedural statutes passed by Congress supersede any prior, conflicting Federal Rule. And they have specifically held that PLRA provisions supersede conflicting earlier-adopted court rules.[73] Here, where the later-enacted PLRA sets forth a unique procedure for screening prisoner litigation prior to service of process, the PLRA conflicts with the generally applicable provisions of the earlier-adopted Rules 8, 9 and 15, and the PLRA controls. As the Court of Appeals, in its *Baxter* decision, recognized[74]:

> Unlike in typical civil litigation, courts discharging their screening duties under the PLRA must not wait until the complementary rules of civil procedure, such as civil discovery or responsive motions, are implemented by the

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[71] *See, Kremer v Chemical Construction Corp,* 456 US 461, 470 (US 1982)(deciding two statutes could be read consistently and finding no implied partial repeal).

[72] 28 USC § 2072(b).

[73] For example: *Callihan v Schneider,* 178 F3d 800, 802-03 (CA 6 1999)(holding the PLRA repealed earlier-enacted provisions of F R Civ P 24(a)); *Floyd v United States Postal Service,* 105 F3d 274, 277-78 (CA 6 1997)(holding that where the PLRA conflicts with the earlier-adopted F R Civ P 24(a), the statute controls); and *Jackson v Stinnett,* 102 F3d 132, 135-36 (CA 5 1996)(holding the PLRA repeals F R Civ P 24(a) to the extent of the conflict between the two).

[74] *Baxter,* 305 F3d at 490.

> defendant. While the Federal Rules of Civil Procedure shift the burden of obtaining clarity to the defendant, the PLRA shifts that burden to the courts. The heightened pleading requirement, in cases to which the PLRA applies, effectuates the PLRA's screening requirement.

F. This Court's rulings rejecting judicially-created heightened pleadings standards do not control here.

In *Baxter* the Court of Appeals also appropriately distinguished *Swierkiewicz v Sorema*. Unlike the **judicially-created** heightened pleading requirements that this Court struck down in *Swierkiewicz*, the PLRA's heightened pleading requirement is inherent in the **statute**.[75] *Swierkiewicz* involved plaintiff's claim for employment discrimination. In *Swierkiewicz*, this Court noted that the complaint stated claims upon which relief could be granted.[76] But that is not the case here, where the PLRA provides that "no action shall be brought" absent exhaustion of administrative remedies.[77] In prison litigation regarding conditions of confinement, where the plaintiff does not allege exhaustion the plaintiff fails to state a claim and fails to show a reasonable opportunity to prevail on the merits. Under these circumstances 42 USC § 1997e(a) of the PLRA requires dismissal without prejudice, and 28 USC § 1997(g) forbids requiring any response from a defendant.

Further, the analogy to employment discrimination cases that require exhaustion of administrative remedies does not fit the instant case, because employment discrimination cases are not subject to pre-service screening as PLRA cases are. This Court noted in *Swierkiewicz* that: "The prima facie

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[75] *Swierkiewicz v Sorema NA*, 534 US 506 (2002).
[76] *Swierkiewicz*, 534 US at 514.
[77] 42 USC § 1997e(a).

case under *McDonnell Douglas* [*Corp. v Green*, 411 US 792 (1973)], however, is an evidentiary standard, not a pleading requirement."[78] Further, in *Swierkiewicz*, this Court relied on the fact that not every employment discrimination case required proof of all elements of the prima facie case[79]:

> Under a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case because the *McDonnell Douglas* framework does not apply in every employment discrimination case. For instance, if a plaintiff is able to produce direct evidence of discrimination, he may prevail without proving all the elements of a prima facie case.

But this is not true in the instant case, where the requirement to exhaust administrative remedies does apply to every suit that the PLRA encompasses, and where exhaustion of administrative remedies is a pleading requirement.

Unlike in an employment discrimination case, the unique PLRA screening process does require a prisoner to state a claim upon which relief can be granted and show a reasonable opportunity to prevail on the merits in the initial complaint, or experience dismissal without prejudice. The *Swierkiewicz* decision is not controlling here.

Similarly, *Leatherman v Tarrant* is distinguishable.[80] *Leatherman* was a suit against a municipality based on 42 USC § 1983. In that case the Fifth Circuit applied a judicially-created heightened pleading standard that had been adopted in that circuit, and dismissed the case. This Court concluded that federal courts cannot adopt a more demanding pleading

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[78] *Swierkiewicz*, 534 US at 510.
[79] *Swierkiewicz*, 534 US at 511.
[80] *Leatherman v Tarrant County Narcotics Intelligence & Coordination Unit*, 507 US 163 (US 1993).

standard than that embodied in Rules 8 and 9, noting that if the Federal Rules were to be rewritten, they might indeed include a heightened pleading standard for such municipal liability claims. In the absence of amendments to the Federal Rules of Civil Procedure imposing a heightened pleading standard, this Court held, "federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later."[81] The *Leatherman* decision does not take into consideration the "new regime" ushered in by the PLRA. The PLRA requires the courts to sort out meritless claims prior to service of process on any defendant. The PLRA supersedes the Federal Rules to the extent those rules, as applied by *Leatherman,* required the litigants and the courts to wait until summary judgment to weed out unmeritorious claims.

Similarly, *Crawford-El v Britton* is not contrary to the Court of Appeals' decisions in the instant cases.[82] The plaintiff-inmate claimed that prison staff retaliated against him for exercising his First Amendment rights by intentionally losing his property when he was transferred from prison to prison. The DC Circuit established a new rule requiring "clear and convincing evidence" of improper motivation for all civil rights cases. This Court rejected the clear and convincing evidence standard, stating that neither 42 USC § 1983 nor other federal statutes required imposing this standard on civil rights cases. This Court noted that the DC Circuit rule applied not just to cases brought by prisoners[83]:

> The new rule established in this case is not limited to suits by prisoners against local officials, but applies to all classes of plaintiffs bringing damages actions against any government official, whether federal, state or

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[81] *Leatherman,* 507 US at 168-69.
[82] *Crawford-El v Britton,* 523 US 574 (1998).
[83] *Crawford-El,* 523 US at 585 (footnotes omitted).

> local. See *Butz v Economou*, 438 US 478, 500-504; 57 L Ed 2d 895; 98 SCt 2894 (1978). The heightened burden of proof applies, moreover, to the wide array of different federal law claims for which an official's motive is a necessary element, such as claims of race and gender discrimination in violation of the Equal Protection Clause, cruel and unusual punishment in violation of the Eighth Amendment, and termination of employment based on political affiliation in violation of the First Amendment, as well as retaliation for the exercise of free speech or other constitutional rights.

Importantly, in *Crawford-El* this Court recognized the PLRA was designed to address the problems with the large number of prisoner lawsuits and their frequently meritless claims. But the state of mind issue that prompted the DC Circuit to establish a heightened pleading requirement with respect to all civil rights claims, this Court found, was not addressed in the PLRA[84]:

> Most significantly, the statute draws no distinction between constitutional claims that require proof of an improper motive and those that do not. If there is a compelling need to frame new rules of law based on such a distinction, presumably Congress either would have dealt with the problem in the Reform Act, or will respond to it in future legislation.

In the instant cases, in contrast, the issues have been addressed by Congress in the PLRA, that is, the need for initial screening by the courts and the mandatory exhaustion requirement have

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[84] *Crawford-El*, 523 US at 597.

superseded the usual rules that apply to civil rights cases in general.

II. The PLRA requires the inmate to plead and demonstrate exhaustion as to all defendants.

The Court of Appeals' application of the PLRA in the instant cases comports with a premier purpose of that act: to decrease the quantity and increase the quality of prisoner litigation. As this Court is well aware, prisoner complaints are frequently lengthy, rambling, and are devoid of any editorial judgment with respect to inclusion of claims ranging from valid to marginal to meritless. The PLRA, as applied by the Court of Appeals here, requires the inmate to at least give enough thought to the allegations to assure that exhaustion of administrative remedies is complete for all claims, before requiring a defendant to respond to the complaint. The PLRA relieves the defendant from the general requirement to promptly file an answer after service of a complaint and provides that "[t]he court may require any defendant to reply to a complaint . . . if it finds that the plaintiff has a reasonable opportunity to prevail on the merits."[85] This language supports the Court of Appeals' interpretation of the PLRA requiring plaintiffs to plead and demonstrate exhaustion. Where exhaustion is mandatory, but the plaintiff has not alleged exhaustion, a district court could not find that the plaintiff had a reasonable chance to prevail on the merits and could not find that the plaintiff stated a claim upon which relief could be granted.

A. To the extent that F R Civ P 8 and 15 do not countenance the pre-service screening aspect of the PLRA, they are superseded by the statute.

Federal Rule of Civil Procedure 8 provides in pertinent part: A pleading which sets forth a claim for relief, . . . shall

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[85] 42 USC § 1997e(g)(2)(emphasis added).

contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. . . .

In *Swierkiewicz v Sorema,*[86] the most recent decision of this Court rejecting a judicially-imposed heightened pleadings requirement, this Court quoted from *Scheuer v Rhodes,*[87] which stated the following in explaining the notice pleading concept:

> When a federal court reviews the sufficiency of a complaint before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely, but that is not the test.

But this standard as explicated by this Court in 1974 is the backdrop to the later-enacted PLRA judicial screening requirements. In stark contrast to *Scheuer's* pleading requirement, consider 42 USC § 1997e(g)(2) which provides:

> The court may require any defendant to reply to a complaint brought under this section if it finds that the plaintiff has a reasonable opportunity to prevail on the merits.

This PLRA provision is a keynote in Congress's intent to adopt a new regime with respect to pleadings in federal litigation brought by prisoners.

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[86] *Swierkiewicz*, 534 US at 511, 513.
[87] *Scheuer v Rhodes*, 416 US 232, 236 (1974).

Discussing F R Civ P 8 (a), standards this Court stated: "This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims."[88] But the statute at issue here does not countenance waiting until discovery to dispose of unmeritorious claims. The general provisions of the Rule 8 are therefore superseded by the specific PLRA statutory provisions.[89] Under Rule 8 "a complaint need only provide 'fair notice' of what the plaintiff's claim is and the grounds upon which it rests'."[90] The PLRA requires a much more specific showing.

Similarly, F R Civ P 15(a)'s direction to freely permit amendment of the complaint when justice requires it appears to be at odds with mandatory exhaustion in combination with the PLRA's judicial screening process. Rule 15 can be interpreted, in light of the PLRA's provisions, to deny amendments because justice requires denial. In the alternative, to the extent there is a conflict between Rule 15(a) and the statute, the statute takes precedence.[91]

In *Baxter v Rose* the Court of Appeals held: "a prisoner may not amend his complaint to cure the failure to plead the exhaustion of administrative remedies, if his action is covered by the PLRA."[92] The Court of Appeals cited all of the sua sponte screening provisions of the PLRA, stating: "[T]he heightened pleading standard permits federal courts to determine whether the claim can be decided on the merits, without inefficiently expending judicial resources on evidentiary hearings and responsive pleadings."[93] And the

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[88] *Swierkiewicz v Sorema NA*, 534 US at 512.
[89] See discussion Arg. I. E, *supra*.
[90] *Mayle v Felix*, 545 US __; 125 SCt 2562, 2570; 162 L Ed 2d 582 (2005)(quoting *Conley v Gibson*, 355 US 41, 47 (1957)).
[91] *Baxter*, 305 F3d at 489-90.
[92] *Baxter*, 305 F3d at 488.
[93] *Baxter*, 305 F3d at 488.

Court of Appeals emphasized: "The possibility of amendment undermines the screening process, preventing courts from efficiently evaluating whether the plaintiff met the exhaustion requirement."[94] The Tenth Circuit's opinion in *Plunk v Givens* concurs with this analysis: "[T]he plain language of § 1915A makes clear that the "statute . . . does not require that process be served or that the plaintiff be provided an opportunity to respond before dismissal." [95]

Similarly, as the Court of Appeals recognized in *Baxter*, there is tension between F R Civ P 15(a)'s provision that leave to amend a complaint should be freely given and the PLRA's initial screening requirement.[96] But *Baxter* correctly held that "A plaintiff who fails to allege exhaustion of administrative remedies though 'particularized averments' does not state a claim on which relief may be granted, and his complaint must be dismissed *sua sponte*."[97]

The model instituted by the PLRA – screening by the court before requiring a defendant to respond – is the one habeas corpus uses and this Court recently noted that it is appropriate to look to the body of habeas corpus law for guidance in interpreting the PLRA.[98] Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts provides that district courts "must promptly examine" state habeas petitions and must dismiss the petition sua sponte "if it plainly appears . . . that the petitioner is not entitled to relief."[99] Habeas corpus procedures also employ heightened pleading. Rule 2 requires that the petition must "specify all the

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[94] *Baxter*, 305 F3d at 489.

[95] *Plunk v Givens*, 234 F3d 1128, 1130 (CA 10 2000); But *see*, *Lira v Herrera*, 427 F3d 1164 (CA 9 2005).

[96] *Baxter*, 305 F3d at 489 n 3.

[97] *Baxter*, 305 F3d at 489 (citing *Knuckles El v Toombs*, 215 F3d 640, 642 (CA 6 2000); *Brown*, 139 F3d at 1104.

[98] *Woodford*, 126 SCt at 2384.

[99] *Day v McDonough*, 547 US __; 126 SCt 1675, 1683; 164 L Ed 2d 276 (2006).

grounds for relief available to the petitioner: and "state the facts supporting each ground."[100] This is "more demanding" than F R Civ P 8 notice pleading.[101] This standard applies notwithstanding that over 90% of habeas petitioners are pro se.[102] It follows that, in order to screen cases under the PLRA, it too requires heightened pleading.

Further, the PLRA judicial screening requirements are analogous to the law of qualified immunity, in that the PLRA effectively accord defendants "an entitlement not to stand trial or face the other burdens of litigation" including discovery, until the district court conducts the mandatory screening process and concludes the prisoner has a "reasonable opportunity to prevail on the merits."[103]

B. To the extent that F R Civ P 9 does not countenance the lack of an answer and pre-screening aspects of the PLRA's new regime, the PLRA controls.

To the extent there is conflict, the PLRA also supersedes F R Civ P 9. While Rule 9(c) indicates that conditions precedent may be pleaded generally, it also states that a "denial of performance . . . shall be made specifically and with particularity." But this provision contemplates an adversarial scenario, while the PLRA provides for *sua sponte* screening. And Congress emphasized that judicial screening must precede any involvement by any defendant in multiple PLRA provisions. Congress could not have made this any clearer than in 28 USC § 1915A(a) which provides that judicial screening must occur "before docketing if feasible or in any event, as soon as practicable after docketing. . . ." Under the PLRA the court must determine from the complaint alone

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[100] *Mayle*, 125 SCt at 2570.
[101] *Mayle*, 125 SCt at 2570.
[102] *Duncan v Walker*, 533 US 167, 191 (2001)(Breyer, J., dissenting).
[103] *Saucier v Katz*, 533 US 194, 200-01 (2001)(discussing immunity from suit effected by qualified immunity).

without any input of any kind by any defendant whether "the plaintiff has a reasonable opportunity to prevail on the merits."[104] The PLRA therefore requires the complaint itself to provide the specificity necessary to allow the court to determine whether or not the plaintiff is reasonably likely to prevail on the merits. In *Woodford*, this Court stated: "Construing § 1997e(a) to require proper exhaustion also fits with the general scheme of the PLRA, whereas respondent's interpretation would turn that provision into a largely useless appendage."[105] In the instant case, treating the exhaustion requirement as an affirmative defense would render the PLRA's requirement for the court to determine whether the prisoner has a reasonable likelihood of prevailing on the merits an impossible or worthless endeavor. Rule 9's provisions, which contemplate an adversarial process, are therefore superseded by the PLRA and exhaustion cannot be treated as an affirmative defense.

The scenario Petitioners pose, where exhaustion would be treated as an affirmative defense in fact proves too much. This is because if the complaint alone does not show that it states a claim upon which relief can be granted and that plaintiff has a reasonable opportunity to prevail on the merits, the court is compelled to dismiss the action without ever requiring a defendant to respond to it.

C. The Prison Litigation Reform Act requires a prisoner to identify a particular prison official during the grievance process in order to sue that person.

The Court of Appeals, in the present case and in several earlier cases, properly interpreted the PLRA's exhaustion language to require prisoners to identify in their grievances, the

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[104] 41 USC § 1997e(g)(2).
[105] *Woodford*, 126 SCt at 2387.

particular officers they intend to sue.[106] This requirement is necessary to allow the courts to conduct pre-service screening to determine whether the inmate has properly exhausted all administrative remedies. Further, this interpretation is consistent with the plain language of the statute because it furthers the objectives of increasing the quality and decreasing the quantity of prisoner lawsuits.

Petitioners' interpretation of the statute would effectively render the statute meaningless. If all a prisoner is required to do is simply describe the problem being grieved, there would be no meaningful record developed and judicial screening would be hampered. For example, under the Petitioners' view of the statute, a prisoner could say, "Someone hurt me in my cell," and that would suffice to put prison officials on notice of a problem. Prison officials could not possibly address that kind of problem internally under such a scenario. Yet, under the Petitioners' "notice" rule, it would be sufficient to satisfy the PLRA exhaustion requirement. This Court recently noted that Congress did not intend to create a "toothless" scheme when it passed the Prison Litigation Reform Act.[107] Petitioners' interpretation would effectively turn the exhaustion requirement into a "useless appendage."[108] The Petitioners assert that the naming rule is inconsistent with one of the PLRA's purposes, which was to alert prison officials of problems in their prisons. Again, a grievance that lists no names, descriptions or job titles does not develop the administrative record the PLRA requires. Without identifying the individual who caused the problem, prison officials would be hard pressed to resolve the problem.

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[106] *Curry*, 249 F3d at 505; *Burton v Jones*, 321 F3d 569, 575 (CA 6 2003); *Thomas v Woolum*, 337 F3d 720, 735 (CA 6 2002)(overruled on other grounds by *Woodford*).

[107] *Woodford*, 126 SCt at 2388.

[108] *Woodford*, 126 SCt at 2387.

This Court recognized the proper exhaustion standard in *Woodford*[109]:

> The benefits of exhaustion can be realized only if the prison grievance system is given a fair opportunity to consider the grievance. The prison grievance system will not have such an opportunity unless the grievant complies with the system's critical procedural rules.

A rule requiring a prisoner to identify all of the officials in the grievance process prior to filing suit, and to exhaust administrative remedies as to each of them also helps further the goal of creating an administrative record for the district court to review. This Court has held that creating an administrative record is an important purpose behind the PLRA "for cases ultimately brought to court adjudication could be facilitated by an administrative record that clarifies the contours of the controversy."[110] Moreover, requiring prisoners to identify the individuals who allegedly wronged them provides prison officials with fair notice of the claims against them. The Court of Appeals in supporting its decision to adopt a naming requirement concluded that the Court did not impose a heightened pleading requirement upon prisoners.[111] Instead, the naming rule only assures that, as envisioned under the PLRA, the prison system had a chance to deal with complaints against prison staff prior to those complaints reaching federal court, and it allows the court to determine whether the plaintiff has exhausted all administrative remedies against all defendants.[112]

Two Circuits (the Sixth and the Eighth) do require prisoners to identify individuals during the administrative grievance process, and exhaust administrative remedies as to

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[109] *Woodford*, 126 SCt at 2388.
[110] *Porter*, 534 US at 525.
[111] *Curry*, 249 F3d at 505.
[112] *Curry*, 249 F3d at 505.

them, before they can sue the individuals in a federal court.[113] Those courts have held that a failure to do so requires a dismissal without prejudice. Three Circuits (the Third, Fifth, and Eleventh) do not require prisoners to specifically name in the grievance proceedings the prison officials they later sue in federal court.[114] Rather, those three Circuit Courts require that prisoners must provide fair notice in the grievance process to those they later sue in federal court. Two circuits (the Seventh and Ninth) expressly rejected a rule requiring prisoners to name in the grievance process those they later sue in federal court and instead only require that prisoners generally describe the problem in order to satisfy the PLRA's exhaustion requirement.[115]

The approach adopted by the Seventh and Ninth Circuits is contrary to the overall purpose of the PLRA.[116] The approach adopted by the Seventh and Ninth Circuits that only requires prisoners to generally describe a problem in the grievance process as a prerequisite to exhaustion allows prisoners to circumvent the PLRA. Merely describing a problem does not allow prison officials an opportunity to take appropriate action against the potential wrong-doer. Nor does it provide the prison officials with any sort of fair notice that the staff member's behavior is inappropriate. Such a rule would ensure that the administrative records in most cases would be of little or no value to the district court. Similarly, the rule adopted by the Third, Fifth, and Eleventh Circuits would frustrate the policy objectives of the PLRA because it would do little, if anything, to create an accurate administrative record. As this Court noted in imposing a proper exhaustion requirement, "[P]roper exhaustion improves the quality of

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[113] *Curry*, 249 F3d at 505; *Burton*, 321 F3d at 575; *Thomas*, 337 F3d at 735; *Kozohorsky v Harman*, 332 F3d 1141 (CA 8 2003).

[114] *Spruill v Gillis*, 372 F3d 218 (CA 3 2004); *Johnson v Johnson*, 385 F3d 503 (CA 5 2004); *Brown v Sikes*, 212 F3d 1205 (CA 11 2000).

[115] *Ricardo v Rausch*, 375 F3d 521 (CA 7 2004); *Butler v Adams*, 397 F3d 1181 (CA 9 2005).

[116] *Ricardo*, 375 F3d at 524; *Butler*, 397 F3d at 1183.

these prisoner suits that are eventually filed because proper exhaustion often results in the creation of an administrative record that is helpful to the Court."[117] Requiring prisoners to identify those individuals they intend to sue in their grievances undoubtedly will improve the quality of prison suits. Requiring that prisoners do no more than describe a situation in their grievance would undercut Congress's intent in requiring exhaustion of administrative remedies.

Petitioners also claim that the short grievance deadlines would make it nearly impossible for a prisoner to satisfy the naming requirement. As a practical matter, it is not difficult for prisoners in Michigan to name the individual or individuals they intend to sue. Michigan has a policy directive, PD 02.03.103, Employee Uniforms, ¶ I (effective November 18, 2002), that requires all MDOC employees to wear name tags while on duty. Previous versions of the policy contained the same requirement. It is not too much to ask a prisoner to read a name tag prior to filing a grievance. This Court recently recognized that "[P]risoners who litigate in federal court generally proceed in *pro se* and are forced to comply with numerous unforgiving deadlines and other procedural requirements."[118] Requiring prisoners to do nothing more than read a name tag or ask a prison official for a staff member's name cannot be considered unforgiving. Petitioner Jones in response to the Court's order requiring him to name the John and Jane Does he wanted to sue, promptly informed the Court of Konkle and Aldabagh's names. Jones thus demonstrated the ability to name specific individuals.

This Court has held that one of the PLRA's "dominant concern[s]" is to "foster better prepared litigation of claims aired in court."[119] In order to carry out that purpose the Court of Appeals properly interpreted the PLRA to require that a

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[117] *Woodford*, 126 SCt at 2388.
[118] *Woodford*, 126 SCt at 2393.
[119] *Porter*, 534 US at 528.

prisoner name individuals in the grievance process, and exhaust administrative remedies as to them, before being permitted to bring a federal lawsuit against them.

It is important to note that since the Petitioners filed their individual grievances the MDOC's grievance policy has undergone a revision. At the time the Petitioners filed their grievances pursuant to Michigan Department of Correction's Grievance Policy, PD 03.02.130, ¶ U (effective November 1, 2000) (JA I, p 138) prisoners were required to "[B]e as specific as possible." Under the old policy, applicable to Petitioners Williams and Walton, they failed to ever identify or describe all of the parties they intended to sue. For example, Walton did no more than name Respondent Bobo in his grievance. Yet, he sued five other individuals. Even under the old policy directive, Walton was not specific enough to satisfy the more relaxed standard found in *Thomas* in which the Court of Appeals held that prisoners "[N]eed not identify each officer by name when the identities of the particular officers are unknown . . ."[120] Walton presented no evidence in the District Court that he did not know the identities of the other five parties to the lawsuit, and made no attempt to "be as specific as possible" and identify them by job title, shift or physical description.

In late 2003, after all the grievances in the instant case had been filed, MDOC changed its policy. The current version of Policy Directive 03.02.130, ¶ T (effective December 19, 2003) (Respondents' Appendix, *infra,* p 1b) does require prisoners to specifically name prison officials they intend to grieve. Providing: "Dates, times, places and names of all those involved in the issue being grieved . . ." Proper exhaustion, as *Woodford* provides, will require grievants, from December 19, 2003 forward, to provide these details in their grievances. Again, if the inmate does not know and cannot determine the name of the staff member involved, explaining this and providing a physical description, job title, shift and/or other

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[120] *Thomas*, 337 F3d at 734.

details that will allow state officials to identify the staff member will suffice even under the new policy.

Contrary to the Petitioners' assertion on page nine of their brief, the new policy, PD 03.02.130 ¶ T (effective December 19, 2003) is very relevant to future cases. Since, at least in Michigan, prisoners are now required to name those they intend to grieve, per the current grievance policy, prisoners cannot properly exhaust as required by *Woodford* if they do not name the person they intend to grieve. If this Court adopts a rule in which prisoners are only required to put prison officials on notice of a problem it would invalidate a portion of Michigan's grievance policy. Furthermore, a rule requiring prisoners to do nothing more than give prison officials notice of a problem would run afoul of this Court's holding in *Porter* because it would have the effect of decreasing the quality of prisoner lawsuits by allowing a diminished administrative record.[121]

D. This Court's decision in *Sims v Apfel* in which this Court rejected a judicially created issue-exhaustion requirement is easily distinguishable from the instant cases.

Petitioners cite *Sims v Apfel* for the proposition that the naming requirement is inconsistent with the language of the PLRA.[122] *Sims* is distinguishable from this case.

In *Sims* this Court reversed a decision from the Fifth Circuit and held that a judicially created issue-exhaustion requirement was inappropriate in the context of a Social Security Administration (SSA) hearing before an Administrative Law Judge.[123] This Court reasoned that since there are pronounced differences between SSA hearings and the Courts, it was unfair to impose an issue-exhaustion

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[121] *Porter*, 534 US at 525.
[122] *Sims v Apfel*, 530 US 103 (2000).
[123] *Sims*, 530 US at 112.

requirement on parties to such hearings. Ultimately this Court held that since the Social Security Appeals Council and the claimant described the issues at the hearing, exhaustion did not make any sense in the context of an SSA hearing.[124]

First, *Sims* is distinguishable because here, there is a statutory mandate for exhaustion, not a judicially-created requirement. And, the PLRA and *Woodford* undercut the Petitioners' argument. This Court held in *Woodford* that proper exhaustion of administrative remedies is necessary to satisfy the PLRA's exhaustion requirement.[125] According to this Court, "Proper exhaustion demands compliance with an agency's deadlines and other critical procedural rules because no adjudication system can function effectively without imposing some ordered structure on the course of its proceedings."[126] Unlike *Sims*, which dealt with SSA hearings, *Woodford* specifically dealt with the PLRA. Consequently, *Woodford's* proper exhaustion standard applies as opposed to the more general *Sims* standard.

Second, *Sims* turned on the fact that the Appeals Council had primary responsibility for choosing and elaborating on the issues. Under the PLRA, in contrast, the prisoner has full control of naming and developing the issues.

E. The naming convention applied by the Court of Appeals is completely in accord with proper exhaustion requirements set forth in *Woodford*.

The Court of Appeals' naming requirement is consistent with proper exhaustion. Merely putting prison officials on notice of a problem, without naming the individual or individuals involved, does not give prison officials enough information to resolve the problem. The naming requirement is necessary even in the absence of a specific policy requiring it.

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[124] *Sims*, 530 US at 112.
[125] *Woodford*, 126 SCt 2382.
[126] *Woodford*, 126 SCt 2386.

As noted above, proper exhaustion requires prisoners to comply with an agency's procedural rules. Respondents submit that the PLRA requires prisoners to name in the grievance process those they later sue even absent a specific state policy requiring them to do so. Even if at the time the initial grievance is filed, the inmate does not know the names of all those involved, the inmate must provide sufficient information that all individuals can be identified as the grievance and appeal process proceeds. Only then can the grievance process function effectively and allow prison officials to fully address the claims in the administrative stage.

F. These rules are not unduly punitive.

Finally, requiring total exhaustion of all claims and heightened pleadings is not unduly punitive.[127] It is true that prisoners who do not totally exhaust all of their claims will have to re-file their complaint and most courts will assess another filing fee.[128] But this would provide a significant incentive to conform with the total exhaustion requirement before filing suit. And, prisoners can still proceed *in forma pauperis* when they qualify for that status. As inmates have learned that they must plead and show total exhaustion in the habeas corpus context, they will likewise learn that they must plead and show total exhaustion in all federal civil litigation.[129]

The total exhaustion requirement further gives prisoners a strong incentive to exhaust all of their administrative remedies as to all claims, before bringing their cases to court. This Court rejected the respondent's argument in *Woodford* that requiring proper exhaustion would be harsh for prisoners who

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[127] *Jones Bey*, 407 F3d at 808.

[128] But not in the Sixth Circuit, where the Court held on August 29, 2006, that an inmate who re-files after dismissal is not "initiating" a lawsuit, and therefore no filing fee will be assessed. *Owens v Keeling*, ___ F 3d ___; 2006 US App Lexis 22077 (CA 6 2006).

[129] *See, Rose v Lundy*, 455 US at 520.

are generally untrained in the law and are frequently poorly educated. "This overlooks the informality and relative simplicity of prison grievance systems like California's as well as the fact that prisoners who litigate in federal court generally proceed *pro se* and are forced to comply with numerous unforgiving deadlines and other procedural requirements."[130] The same is true with respect to the issues addressed in this case. Inmates can be expected to comply with the requirement to properly exhaust administrative remedies, and they can similarly be expected to comply with the total exhaustion and specificity in pleadings requirements. In the habeas corpus context, this Court characterized the total exhaustion requirement as "simple and clear."[131] The very similar PLRA requirements are also simple and clear.

In the event the inmate experiences a dismissal due to lack of total exhaustion based on his original filing, that inmate will have the time to correct any errors and refile.[132] Placing this burden on the inmate rather than requiring the court to essentially edit and redraft the complaint for the inmate, is consistent with the purposes of the PLRA. Thus, they will not be denied an opportunity to proceed on all properly exhausted claims.

The heightened pleadings requirement is inherent in the PLRA. Without a complaint pleading and demonstrating

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[130] *Woodford*, 126 SCt at 2393.

[131] "This scheme reinforces the importance of Lundy's 'simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you first have taken each one to state court.'" (*Rhines v Weber*, 544 US 269, 276-77 (2005), quoting *Rose v Lundy* 455 US 509 (1982)).

[132] The statute of limitations is not a concern because the statute is tolled while the inmate exhausts administrative remedies. *Brown v Morgan*, 209 F3d 595 (CA 6 2000). Further, from the date of service on the defendant, until the dismissal without prejudice, the statute of limitations is also tolled. Once the case is dismissed, the statute resumes running. So Petitioners are not disadvantaged by the dismissal without prejudice. *Federal Kemper Ins. Co. v Issacson*, 145 Mich App 179 (1985).

exhaustion of administrative remedies as to all defendants, the mandatory exhaustion requirement in combination with the judicial screening requirement for making a determination that the plaintiff has a reasonable opportunity to prevail on the merits, requires dismissing the complaint. Petitioners have no explanation of how the courts can determine whether the plaintiff has a reasonable opportunity to prevail on the merits in the absence of heightened pleadings. The PLRA requires the inmate to make a full administrative record and requires the Court to screen cases as soon after filing as is feasible. It is only logical that the inmate must make the administrative record available to the Court at the initial screening stage.

III. The PLRA requires total exhaustion; complaints containing both exhausted and unexhausted claims must be dismissed without prejudice in their entirety.

A. The plain language of the statute requires total exhaustion.

The language of the PLRA requires total exhaustion. First, 42 USC § 1997e(a) provides[133]:

> No **action** shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other Correctional facility until such administrative remedies as are available are exhausted.

Two features of this section of the statute demand total exhaustion. First is the requirement that no action shall be brought until all available administrative remedies have been exhausted. If there are claims pending that have not been exhausted, then obviously available administrative remedies

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[133] 42 USC § 1997e(a)(emphasis added).

have not been pursued, and the statute mandates dismissal. When an **action** contains both exhausted and unexhausted claims, it cannot be said, with respect to that action, that available administrative remedies have been exhausted. Where an inmate attempts to bring federal court claims against two corrections officers for the same or similar alleged unlawful behavior (e.g., denying him medication), where the inmate exhausts remedies against one officer, but not the other, plainly, the inmate has not exhausted all remedies that are available. If the administrative proceedings against the second officer are not exhausted, then the inmate may yet have a remedy through the state grievance system, since the claim might be resolved short of litigation in the grievance against the second officer. Based on this resolution, the entire issue could be settled, (e.g., the inmate might obtain the medication in dispute) and a lawsuit entirely avoided. In this way total exhaustion serves the PLRA purposes of decreasing the quantity of prisoner litigation, and allowing state officials the opportunity to correct problems before the federal courts become involved.

Second, the use of the term "action" as opposed to "claim" indicates that Congress meant for the entire case to be dismissed, rather than just the unexhausted claim or claims. Congress distinguished between the terms "actions" and "claims" in 42 USC § 1997e(c)(1) and (2). Congress indicated that courts shall dismiss "[A]ny **action** that is frivolous, malicious or fails to state a claim."[134] The very next section provides that a court may dismiss a **claim** if it is frivolous, malicious, or fails to state a claim.[135] Congress drew a distinction between a "claim," which is an individual allegation, and an "action," which is an entire lawsuit.[136] The use of the word "claims" in the PLRA indicates that claims are individual allegations while actions are entire lawsuits. As the

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[134] 42 USC § 1997e(c)(1).
[135] 42 USC § 1997e(c)(2).
[136] *Jones Bey*, 407 F3d at 807.

Sixth Circuit noted in making the distinction between the terms "action" and "claim"[137]:

> If a district court is presented with a "mixed" petition, it has the power under subsection (c)(2) to dismiss any frivolous claim, exhausted or not, *with prejudice*. However, dismissal under subsection (a) allows the court to dismiss the entire action *without prejudice*. The *Smeltzer* court recognized that Congress must have intended that courts could use subsection (c)(2) to dismiss unexhausted claims as frivolous to keep them from "holding up" the others. *Smeltzer v Hook*, 235 F Supp 736, 744 (WD Mich 2002). In the alternative the court could dismiss the entire action without prejudice and allow the prisoner to refile only exhausted claims.

Third, reading the plain language of the statute to require dismissal of the entire action where one or more claims remain unexhausted does not make any portion of the statute superfluous.[138] Looking at the three pertinent portions of the subsections of 42 § USC 1997e affirms this:

> § 1997e. Suits by prisoners
>
> (a) Applicability of administrative remedies. No action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 USC § 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility

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[137] *Jones Bey*, 407 F3d at 807.

[138] *Hibbs v Winn*, 542 US 88, 101 (2004)(providing that all statutes must be read to give all provisions effect and no provision is read to be superfluous).

> until such administrative remedies as are available are exhausted.
>
> * * *
>
> (c) Dismissal.
>
> (1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 USC § 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.
>
> (2) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.

In a nutshell: 1997e(a) provides that the court must dismiss the case without prejudice if there is any unexhausted claim; 1997e(c)(1) requires the court to dismiss meritless actions, most often with prejudice; and 1997e(c)(2) provides that the court has the option to sort through the claims and dismiss meritless claims with prejudice, without the necessity of addressing the exhaustion issue as to meritless claims. This provision also serves to show exhaustion is not jurisdictional.[139]

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[139] *Woodford*, 126 SCt at 2392.

1. § 1997e(a) requires dismissal without prejudice for failure to exhaust administrative remedies.

As this Court stated in *Woodford v Ngo* in interpreting § 1997e(a): ". . . saying that a party may not sue in federal court until the party first pursues **all** available avenues of administrative review necessarily means that if the party never pursues **all** available avenues of administrative review, the party will never be able to sue in federal court."[140] The statute thus plainly provides that if an inmate does not pursue all administrative remedies, he cannot sue in federal court. This is the essence of the total exhaustion requirement. If one claim is left unexhausted, the action shall not be brought.

Petitioners contend that because Congress did not add "or include any unexhausted claims" as a reason for dismissal of the entire action under 1997e(c)(1), means that there is no total exhaustion requirement. This contention erroneously assumes that 1997e(a) in itself does not require dismissal of the action where an inmate fails to exhaust administrative remedies. A requirement that no action shall be brought absent exhaustion without a dismissal requirement would indeed be a mere suggestion, which cannot be what Congress intended. As this Court stated in *Woodford*, that "would be like copying the design of an airplane, but omitting one of the wings. And *Woodford* affirms that the PLRA exhaustion requirement is not toothless.[141] Exploring this Court's interpretations of exhaustion requirements in similar statutes in the administrative law context confirms that § 1997e(a) requires dismissal: "Exhaustion is an important doctrine in both administrative and habeas law, and we therefore look to those bodies of law for guidance."[142]

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[140] *Woodford*, 126 SCt at 2391 (emphasis added).
[141] *Woodford*, 126 SCt at 2388.
[142] *Woodford*, 126 SCt at 2384.

For example, in *Hallstrom v Tillamook County,* this Court interpreted a statute with a very similar exhaustion requirement.[143] The Resource Conservation and Recovery Act of 1976 (RCRA) provides that no action may be commenced against an alleged violator prior to 60 days after giving notice to the EPA, the State and the alleged violator. Plaintiff farmowners notified the county in writing and then started a lawsuit a year later. On March 1, 1983 the county moved for summary judgment on the ground that the farmowners had failed to notify the EPA and Oregon. The district court held the Plaintiff had cured any defect by notifying the EPA and Oregon on March 2, 1983, and the agencies would have 60 days to take appropriate steps to cure any violation at the landfill. The Ninth Circuit held that the farmowners' failure to comply with the notice and 60 day delay requirements deprived the district court of subject matter jurisdiction.

This Court affirmed, but held that there was no need to determine whether the requirement is jurisdictional or merely procedural. The Court held its decision would be given retroactive effect, though this case had been litigated for nearly 4 years and received a determination on the merits by the district court. ". . . [W]e hold that where a party suing under the citizen suit provision of RCRA fails to meet the notice and 60-day delay requirements of § 6972(b), the district court **must dismiss the action as barred by the terms of the statute.**"[144] Similarly in the instant cases, where the inmates failed to comply with the PLRA requirement to exhaust all administrative remedies available to them, their cases were barred by the statute.

Hallstrom is a prime example of this Court's commitment to keep intact the incentive to properly exhaust all administrative procedures required by the statutes. Though dismissing the case for failure to exhaust after four years of

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[143] *Hallstrom v Tillamook County*, 493 US 20 (1989).
[144] *Hallstrom* 493 US at 33 (emphasis added).

litigation was contrary to judicial economy in the *Hallstrom* case itself, *Hallstrom* informs potential litigants that they need to comply with the plain statutory language and properly exhaust before suing. This will better serve judicial economy in the long run, undoubtedly solving some issues short of litigation and ensuring an administrative record is available prior to suit.

Similarly, in *McNeil* this Court interpreted a provision of the Federal Tort Claims Act that is very similar to 42 USC § 1997e(a).[145] The Federal Tort Claims Act (FTCA) provides in 28 USC § 2675(a) that an "action shall not be instituted upon a claim against the United States for money damages" unless the claimant first exhausts administrative remedies with the appropriate federal agency. In *McNeil*, an action filed by an inmate proceeding *pro se*, the question was whether an FTCA action could be maintained where the claimant failed to exhaust administrative remedies before filing suit, but accomplished exhaustion before substantial progress in the litigation. This Court held that it could not[146]:

> The command that an "action shall not be instituted . . . unless the claimant shall have first presented the claim to the appropriate Federal Agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail" is unambiguous. We are not free to rewrite the statutory text. As of March 6, 1989, petitioner had neither presented his claim to the Public Health Service, nor had his claim been "finally denied" by that agency. As the Court of Appeals held, petitioner's complaint was filed too early.

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[145] *McNeil v United States*, 508 US 106 (1993).
[146] *McNeil*, 508 US at 111.

The *McNeil* Court held that the appropriate response by the court was to dismiss the action[147]:

> The most natural reading of the statute indicates that Congress intended to require complete exhaustion of Executive remedies before invocation of the judicial process. Every premature filing of an action under the FTCA imposes some burden on the judicial system and on the Department of Justice which must assume the defense of such actions. Although the burden may be slight in an individual case, the statute governs the processing of a vast multitude of claims. The interest in orderly administration of this body of litigation is best served by adherence to the straightforward statutory command.

McNeil noted that "one objective" of the statute was to "reduce unnecessary congestion in the courts."[148] And *McNeil* expressly rejected the argument that the rigor of the statute should be relaxed because pro se prisoners are often the litigators: "[G]iven the clarity of the statutory text, it is certainly not a 'trap for the unwary.'"[149]

In addition to the administrative law cases supporting the dismissal requirement when an inmate fails to exhaust, there is case law involving actions by prisoners under 42 USC § 1983 that provides strong support for this requirement. In prisoner litigation under § 1983, this Court has specifically held that the absence of a precondition for suit means that the inmate has no cause of action. In *Heck v Humphrey*, this court held that before the inmate plaintiff could bring an action under 42 USC § 1983 that implied the invalidity of his conviction,

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[147] *McNeil*, 508 US at 112.
[148] *McNeil*, 508 US at 112 n 8.
[149] *McNeil*, 508 US at 113.

the plaintiff had to first reverse the conviction through appeal, habeas corpus, or other post-conviction remedies.[150] This Court stated: "We do not engraft an exhaustion requirement upon § 1983, but rather deny the existence of a cause of action."[151] This court elaborated[152]:

> "[T]he § 1983 claim has not yet arisen. Just as a cause of action for malicious prosecution does not accrue until the criminal proceedings have terminated in the plaintiff's favor . . . so also a § 1983 cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated.

In *Edwards v Balisok* this Court, in dealing with this same issue, stated: "We reemphasize that § 1983 contains no judicially imposed exhaustion requirement, [citing *Heck*] absent some other bar to the suit, a claim either is cognizable under § 1983 and should immediately go forward, or is not cognizable and should be dismissed."[153] By analogy, the PLRA exhaustion requirement is a bar requiring dismissal because an action challenging prison conditions is not cognizable absent exhaustion of administrative remedies.

In the instant cases, of course, there is a statutorily-imposed exhaustion requirement. The analysis of this Court in *Heck* and *Edwards* applies here with even more force: Absent exhaustion, a claim is not cognizable and must be dismissed. The Court of Appeals recognized this in early decisions issued under the PLRA. In *Brown v Toombs*, the Court of Appeals held that where neither the District Court nor the Magistrate Judge had examined the complaint to determine whether the inmate had exhausted administrative remedies, the Court of

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[150] *Heck v Humphrey*, 512 US 477 (US 1994).
[151] *Heck*, 512 US at 489.
[152] *Heck*, 512 US at 489-90.
[153] *Edwards v Balisok*, 520 US 641, 649 (US 1997).

Appeals was required to sua sponte recognize the lack of exhaustion of administrative remedies, and order the case dismissed.[154]

2. § 1997e(c)(1) requires the court to dismiss meritless actions.

Section 1997e(c)(1) provides exceptions to § 1997e(a), by requiring that the court dismiss the entire action if it is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks money from a defendant who has immunity. Given the statutory criteria, most often dismissals under § 1997e(c)(1) would be with prejudice. It is logical that if an action has no chance for success that it must be dismissed with prejudice, regardless of exhaustion. If the action had no chance of success and the court dismissed it based on lack of exhaustion, the inmate could refile the case after exhaustion. Section 1997e(c)(1) ensures that the inmate will not waste further judicial resources by refiling the same meritless case after exhausting administrative remedies. This provision also serves judicial economy by dismissing plainly untenable actions without unnecessarily consuming judicial resources to make the exhaustion determination.

3. § 1997e(c)(2) Allows the court the option to sort out and dismiss all meritless claims

Finally, § 1997e(c)(2) provides that, regardless of whether all claims have been exhausted, the court has the option of dismissing individual claims with prejudice. Again, this would prevent the inmate from consuming additional judicial resources, on any individual claims for which success is impossible. And as this Court recently held in *Woodford*[155]:

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[154] *Brown v Toombs*, 139 F3d 1102 (CA 6 1998).
[155] *Woodford*, 126 SCt at 2392.

> [E]ven if dismissals under § 1997e(c)(2) typically occur when the opportunity to pursue administrative remedies has passed, § 1997e(c)(2) still serves a useful function by making it clear that the PLRA exhaustion requirement is not jurisdictional, and thus allowing a district court to dismiss plainly meritless claims without first addressing what may be a much more complex question, namely, whether the prisoner did in fact properly exhaust available administrative remedies.

The optional nature of this provision taken with the prior two mandatory sections, logically allows the district court to decide how to expend its resources: Would it be best to dismiss the entire action without prejudice for failure to exhaust, or to sort out claims that are plainly not viable, and dismiss those individual claims with prejudice, while dismissing the balance of the complaint without prejudice for failure to exhaust remedies? This comports with Congress's intent to streamline prisoner litigation: giving the court several options on how to deal most effectively with cases and claims that can never go forward, while still requiring dismissal of the entire action without prejudice for failure to exhaust, if that is the most expeditious method of dealing with the case. This reading is also consistent with the provision of the statute § 1997e(g) that allows waiver of reply and requires a determination that the case has "a reasonable opportunity to prevail on the merits" before a defendant can be required to respond. This plain reading of the statute demonstrates a role for each provision, and is consistent with the underlying policies for the statute: to decrease the numbers and to improve the quality of cases brought by prisoners.

4. Petitioners' analysis of the PLRA is flawed.

Petitioners argue that since § 1997e(c)(1) does not include as a reason for dismissal the words "or contains any unexhausted claims," then Congress did not mean for complaints containing unexhausted claims to be dismissed. But if § 1997e(c)(1) had included a direction to dismiss all actions that include unexhausted claims, then § 1997e(a) would be superfluous. And the statute cannot be read to make any provision superfluous.

Petitioners also argue that § 1997e(c)(2)'s reference to dismissal of unexhausted "claims" juxtaposed with the § 1997e(c)(1) reference to dismissal of an "action," means that unexhausted claims can be treated independently, for purposes of dismissal, from the action as a whole. Petitioners conclude that there would be "little point" in dismissing some actions on the merits if the remainder of the claims had to be dismissed, though exhausted, due to the unexhausted claims that had been dismissed on the merits. But this is not the only potential scenario these provisions could address. For example, if "action" is construed to mean "action" and "claim" is read as "claim" then § 1997e(c)(1) and (2) work together to require the district court to dismiss the entire action if it is meritless. But if the "action" is not meritless, then the court, in its discretion, may choose to dismiss any meritless "claim" regardless of exhaustion. This scenario makes sense because it gives the court the option to dismiss meritless claims under (c)(2) with prejudice so that they are never brought before the court again, regardless of whether the prisoner refiles any portion of the action after completing or demonstrating exhaustion. And the Court is relieved from examining plainly meritless claims to determine whether they have been exhausted, thus serving judicial efficiency.

Petitioners further argue that if "action" in § 1997e(a) means that the entire action must be dismissed if single claim is

unexhausted, then the word "action" in § 1997e(c)(1) must also mean that the entire action must be dismissed if a single claim is meritless. Petitioners argue this would make § 1997e(c)(2) superfluous. But this argument fails to take into account the other language of these two sections of the statute. Section 1997e(a) provides that "no action shall be brought . . . " unless all administrative remedies have been exhausted. If one claim is unexhausted, then the action "shall not be brought" by the plain language of this section. On the other hand, § 1997(c)(1) requires that when an "action" is meritless the "action" shall be dismissed.

These two sections of the statute do not make § 1997e(c)(2) superfluous, since that section allows for dismissal of meritless claims, regardless of exhaustion.

Finally, Petitioners argue that the § 1997e(e) argues in favor of a partial exhaustion rule. That section of the statute provides:

> LIMITATION ON RECOVERY. No Federal civil action may be brought by a prisoner confined in a jail, prison or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

Petitioners contend that the use of the word "action" in this provision really means "claim" and that therefore the word "action" in § 1997e(a) also really means "claim." Petitioners argue that no court has interpreted "action" in § 1997e(e) to mean "action" but rather to mean "claim." Petitioners cite no case where any party has argued that in fact "action" does mean "action" in this statutory provision. If a party raises the question, the court may in fact assume action does mean action and dismiss the entire action. This would be consistent with

placing the burden on the inmate to come to court with a complaint that excludes clearly meritless claims.

5. Total exhaustion is not a trap for the unwary.

Petitioners argue that total exhaustion would constitute a trap for the unwary. But this Court dismissed the notion that exhaustion would constitute a trap for in pro se litigants. In *McNeil*, a case brought by a prisoner *pro se* this Court affirmed that procedural rules apply to lawyers and *pro se* litigants alike[156]:

> Moreover, given the clarity of the statutory text, it is certainly not a "trap for the unwary." It is no doubt true that there are cases in which a litigant proceeding without counsel may make a fatal procedural error, but the risk that a lawyer will be unable to understand the exhaustion requirement is virtually nonexistent. Our rules of procedure are based on the assumption that litigation is normally conducted by lawyers. While we have insisted that the pleadings prepared by prisoners who do not have access to counsel be liberally construed, . . . and have held that some procedural rules must give way because of the unique circumstances of incarceration, see *Houston v Lack*, 487 US 266; 101 L Ed 2d 245; 108 SCt 2379 (1988) (pro se prisoner's notice of appeal deemed filed at time of delivery to prison authorities), we have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel. **As we have noted before, "in the long run, experience teaches that strict adherence to**

[156] *McNeil*, 508 US at 112 (emphasis added).

> **the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law."** *Mohasco Corp v Silver,* 447 US 807, 826; 65 L Ed 2d 532; 100 S Ct 2486 (1980). The FTCA bars claimants from bringing suit in federal court until they have exhausted their administrative remedies. Because petitioner failed to heed that clear statutory command, the District Court properly dismissed his suit.

Further, since in pro se inmates are already required, habeas corpus actions, to comply with total exhaustion, inmates can follow the same simple and clear procedural requirements in their other civil litigation.

B. Section 1997e(a)'s similarities to the habeas corpus statute support total exhaustion.

With respect to the requirement to exhaust administrative remedies, the habeas corpus statute and the PLRA are similar. The similarity cannot be coincidental. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) was "enacted two days after the PLRA."[157] The habeas corpus statute, 28 USC § 2254(b)(1)(A) provides that the court cannot grant a petition unless the petitioner has exhausted the administrative remedies available in the courts of the State. But, the court can deny a petition on the merits, regardless of exhaustion.[158] In *Woodford*, this Court noted that it is appropriate to look to habeas corpus law for guidance in interpreting the PLRA.[159] Courts enforcing the PLRA's total exhaustion requirement rely on the similarities between the two statutes, since the exhaustion requirements in both "were

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[157] *Skinner v Wiley,* 355 F3d 1293, 1294 (CA 11 2004).
[158] 28 USC § 2254(b)(2).
[159] *Woodford*, 126 SCt at 2384.

created for similar reasons, their exhaustion rules should be interpreted in a similar manner."[160]

In 1982 this Court recognized a total exhaustion rule in the habeas corpus context in *Lundy,* finding "[a] rigorously enforced total exhaustion rule will encourage state prisoners to seek full relief first from the state courts, thus giving those courts the opportunity to review all claims of constitutional error."[161] The PLRA was enacted in the mid-nineties, when Congress was well aware of the *Lundy* holding. In the PLRA Congress similarly gives State officials the first opportunity to address inmate issues and strongly encourages prisoners to take advantage of state procedures. The *Lundy* court expounded on additional policy considerations supporting total exhaustion[162]:

> Requiring dismissal of petitions containing both exhausted and unexhausted claims will relieve the district courts of the difficult if not impossible task of deciding when claims are related, and will reduce the temptation to consider unexhausted claims.

These same policy considerations support total exhaustion in the PLRA.

Lundy rejected any suggestion of unnecessary lawmaking: "[O]ur holdings today reflect our interpretation of a federal statute on the basis of its language and legislative history, and consistent with its underlying policies."[163] The *Lundy* decision stated there was no basis to believe the total exhaustion rule would "trap the unwary pro se prisoner."[164] Instead, this Court opined that "our interpretation of §§ 2254(b),(c) provides a **simple and clear** instruction to

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[160] *Jones Bey,* 407 F3d at 808.
[161] *Lundy,* 455 US at 518-19.
[162] *Lundy,* 455 US at 519.
[163] *Lundy,* 455 US at 519-20 (emphasis added).
[164] *Lundy,* 455 US at 520.

potential litigants: before you bring any claims to federal court, be sure that you first have taken each one to state court."[165] This Court expressed confidence that prisoners would master the total exhaustion requirement. "Just as pro se petitioners have managed to use the federal habeas machinery, so too should they be able to master this straightforward exhaustion requirement."[166]

Finally *Lundy* held: "In sum, because a total exhaustion rule promotes comity and does not unreasonably impair the prisoner's right to relief, we hold that a district court must dismiss habeas petitions containing both unexhausted and exhausted claims."[167] These same policy considerations provide foundation for the PLRA's total exhaustion requirement.

The instant Court of Appeals decisions holding that the PLRA requires total exhaustion is also an interpretation of a federal statute on the basis of its language and legislative history and consistent with the statute's underlying policies. In the PLRA context total exhaustion also relieves the court from having to sort through frequently lengthy and disorganized complaints to determine whether each and every claim is exhausted. Instead, the PLRA shifts the burden of either exhausting all claims, or sorting out the exhausted claims to the inmate, who has large blocks of time available to accomplish this task. And, in the PLRA context as well as the habeas context, inmates can master this simple total exhaustion requirement. Further, while many prisoners act pro se, this Court in *Woodford* also rejected any argument that such litigants cannot be expected to comply with exhaustion requirements:[168] "prisoners who litigate in federal court generally proceed pro se and are forced to comply with numerous unforgiving deadlines and other procedural

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[165] *Lundy*, 455 US at 520.
[166] *Lundy*, 455 US at 520 (emphasis added).
[167] *Lundy*, 455 US at 521.
[168] *Woodford*, 126 SCt at 2393.

requirements." Note that habeas petitioners must comply with exhaustion requirements also and 93% of them are in pro se.[169] The *Lundy* decision's reasoning, policy considerations and statutory language all support the Court of Appeals' decision implementing total exhaustion in the PLRA.

In another habeas corpus decision, *Rhines v Weber,* this Court reinterpreted the total exhaustion requirement.[170] Recognizing that ADEPA instituted a one-year statute of limitations that was not extant when *Lundy* issued, this Court held that a habeas petition could be stayed and held in abeyance under certain limited circumstances. While the petition was held in abeyance, the inmate could, by acting promptly, exhaust his state court remedies. In reaching this conclusion, this Court relied heavily on the language of the habeas statute: "An application for a writ shall not be *granted* unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State."[171] But that is a significant difference from the PLRA, which provides: "No action shall be brought . . . " before exhaustion of administrative remedies. The habeas statute precludes granting a writ before exhaustion, whereas the PLRA does not contemplate any stay and abeyance, since it requires exhaustion prior to filing a complaint. Further the prior weaker version of exhaustion in § 1997(d) contained a stay provision that Congress purposely deleted from the current PLRA. Thus, the *Rhines* decision is distinguishable.

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[169] *Duncan*, 533 US at 191 (Breyer, J dissenting).
[170] *Rhines v Weber*, 544 US 269 (2005).
[171] *Rhines*, at 276.

CONCLUSION

The judgments of the Sixth Circuit Court of Appeals should be affirmed.

Respectfully submitted

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RESPONDENTS' APPENDIX

Michigan Department of Corrections Policy
Directive, PD 03.02.130
(effective 12/19/2003).....1b

MICHIGAN DEPARTMENT OF CORRECTIONS **POLICY DIRECTIVE**	EFFECTIVE DATE 12/19/2003	NUMBER 03.02.130
SUBJECT PRISONER/PAROLEE GRIEVANCES	SUPERSEDES 03.02.130 (04/28/03)	
	AUTHORITY MCL 791.203	
	ACA STANDARDS 4-4016; 4-4180; 4-4284; 4-4344	
	PAGE 1 OF 7	

POLICY STATEMENT:

Prisoners and parolees shall be provided with an effective method of seeking redress for alleged violations of policy and procedure or unsatisfactory conditions of confinement.

POLICY:

DEFINITIONS

A. Respondent: The staff person who investigates and responds to a grievance.

GENERAL INFORMATION

B. For purposes of this policy, "Warden" includes the Administrator of the Special Alternative Incarceration Program (SAI) facility, unless otherwise specified.

C. The grievance process shall be equally available to all prisoners housed in Correctional Facilities Administration (CFA) and Field Operations Administration (FOA) facilities and all parolees, unless placed on modified access pursuant to this policy. Prisoners at the Michigan Youth Correctional

Facility shall utilize the grievance process as set forth in PD 05.01.145 "Michigan Youth Correctional Facility". Probationers are not covered by this policy but may resolve specific problems and complaints with supervising staff and, if not resolved, with the sentencing court or, if in SAI, as set forth in PD 06.04.105 "Special Alternative Incarceration Program".

D. Grievances filed by female prisoners regarding allegations of sexual misconduct or other conduct in violation of PD 03.03.140 "Prohibited Conduct in Facilities Housing Female Prisoners" shall be investigated and processed by staff in accordance with PD 03.03.140 where in conflict with this policy. However, complaints made pursuant to PD 03.03.140 shall serve to exhaust a prisoner's administrative remedies only when filed as a grievance in compliance with this policy directive.

E. Grievances may be submitted regarding alleged violations of policy or procedure or unsatisfactory conditions of confinement which directly affect the grievant. This includes alleged violations of this policy and related procedures. A grievant may not grieve the content of policy or procedure; such grievances shall be rejected by the grievance coordinator. If a CFA prisoner has a concern with the content of a policy or procedure, s/he may direct comments to the Warden's Forum as provided in PD 04.01.150 "Prisoner Housing Unit Representatives/Warden's

Forum". A copy of all Warden's Forum minutes shall be sent to the Prisoner Affairs Section in the Office of Audit, Internal Affairs and Litigation (OAIAL) for review of all issues relevant to policy and procedure and the prisoner grievance process.

F. Two or more prisoners and/or parolees may not jointly file a single grievance regarding an issue of mutual impact or submit identical individual grievances regarding a given issue as an organized protest. Such grievances shall be rejected by the grievance coordinator. Grievances that raise the following non-grievable issues also shall be rejected by the Grievance Coordinator:

1. Decisions made in hearings conducted by hearing officers of the Hearings and Appeals Division of the Office of Policy and Hearings (OPH) and decisions made in minor misconduct hearings.

2. Decisions made by the Parole Board and recommendations made by its hearing officers to grant, deny, rescind, amend or revoke parole, or not to proceed with a lifer interview or a public hearing.

3. Issues not within the authority of the Department to resolve:

G. Prisoners and parolees are required to file grievances in a responsible manner. A

grievance shall be rejected by the Grievance Coordinator if it contains profanity, threats of physical harm, or language which demeans the character, race, ethnicity, physical appearance, gender, religion or national origin of any person, unless it is part of the description of the grieved behavior and is essential to that description. A grievance also may be rejected for any of the following reasons:

1. It is vague, illegible, contains multiple unrelated issues, or raises issues that are duplicative of those raised in another grievance filed by the grievant.

2. The grievant is on modified access pursuant to Paragraph JJ through NN and has filed a grievance in violation of those paragraphs.

3. The grievant did not attempt to resolve the issue with the staff member involved prior to filing the grievance unless prevented by circumstances beyond his/her control.

4. The grievance is filed in an untimely manner. The grievance shall not be rejected if there is a valid reason for the delay; e.g., transfer.

H. In CFA, grievances shall not be rejected or denied solely because the prisoner has not included with his/her grievance exhibits or other documents related to the grievance. If the grievance references documents and those

documents are not in the prisoner's files or otherwise available to the grievance coordinator or respondent except through the prisoner, the documents shall be reviewed with the prisoner as part of the grievance investigation process. If the grievance coordinator or respondent determines that a copy of a document is needed for the grievance investigation, the copy shall be made at Department expense.

I. A grievant whose grievance is rejected may appeal the rejection to the next step as set forth in this policy. A new grievance shall not be filed regarding the rejection.

J. Grievances shall not be placed in Counselor files, Record Office files, field files or Central Office files, nor shall they be referenced on any document placed in these files except as necessary pursuant to Paragraph L. Grievance documents and files shall be accessed only to investigate or respond to a pending grievance, to respond to a request under the Freedom of Information Act, to respond to a request from the Department of Attorney General or appropriate Central Office staff, or for audits or statistical reporting.

K. A grievant shall not be penalized in any way for filing a grievance except as provided in this policy for misusing the grievance process. Staff shall avoid any action that gives the appearance of reprisal for using the grievance process or for assisting other grievants in its use. If a grievant believes s/he has been

subjected to acts of reprisal, s/he may file a grievance.

L. If a grievant intentionally files a grievance which is investigated and determined to be unfounded which, if proven true, may have caused an employee or a prisoner to be disciplined or an employee to receive corrective action, the grievant may be placed on modified access consistent with Paragraphs JJ through NN. In addition, if the grievant is a prisoner, s/he may be issued a misconduct report if approved by the Warden or FOA Area Manager; however, major misconduct for Interference with the Administration of Rules shall be issued only if approved by the Warden or FOA Area Manager after consultation with the appropriate Deputy Director or designee. The misconduct report shall be processed as set forth in PD 03.03.105 "Prisoner Discipline".

M. Wardens and FOA Area Managers shall ensure a prisoners and parolees are provided assistance in completing a grievance form, if needed. In such cases, assistance shall be provided by a staff member who is not involved in the grievance.

HURON VALLEY CENTER

N. Grievances filed by a prisoner at the Huron Valley Center (HVC) involving the prisoner's incarceration (e.g., time computation, disciplinary credits, good time, access to law books from the Huron Valley Correctional

Facility) shall be forwarded to the Grievance Coordinator at the Huron Valley Correctional Facility for processing and response.

O. Grievances filed by a prisoner at HVC relating to the prisoner's treatment and living conditions (e.g., quality of the food, room temperatures, not receiving hygiene items, complaints regarding staff, visitor restrictions that are incorrectly imposed) will be responded to by the Department of Community Health (DCH), using the patient grievance process developed by DCH. Grievances answered at the Step III level by the Director of the Bureau of Forensic Mental Health Services shall be forwarded to the Prisoner Affairs Section for record keeping.

GRIEVANCE COORDINATORS

P. In the SAI facility and in each CFA institution, the Warden shall designate at least one staff member to serve as the Step I Grievance Coordinator and at least one staff member to serve as the Step II Grievance Coordinator. The FOA Deputy Director shall designate staff members to serve as Step I Grievance Coordinators and Step II Grievance Coordinators for each FOA field office, corrections center and Technical Rule Violation Center (TRV). Step III grievances shall be processed by the Prisoner Affairs Section.

Q. Each Step I Grievance Coordinator shall prepare and submit monthly reports on

grievances filed in his/her respective facility or office to the Prisoner Affairs Section, as directed by the Manager of the Prisoner Affairs Section. The monthly report shall include information on the subject matter of each grievance filed and, for rejected grievances, the basis for the rejection.

GRIEVANCE PROCESS

R. In an effort to resolve grievable issues as soon as possible, prior to submitting a written grievance, the grievant shall attempt to resolve the issue with the staff member involved within two business days after becoming aware of a grievable issue, unless prevented by circumstances beyond his/her control. If the complaint is not resolved, the grievant may file a Step I grievance. A Step I grievance also may be filed in accordance with OP 03.02.130-A "State Administrative Board Prisoner Property Reimbursement" if the grievance is seeking reimbursement for property lost or destroyed while in the Department's sole possession. If the grievant is dissatisfied with the Step I response, or does not receive a timely response, s/he may appeal to Step II. If the grievant is dissatisfied with the Step II response, or does not receive a timely response, s/he may appeal to Step III.

S. A grievant may file a grievance alleging racial or ethnic discrimination or staff brutality or corruption directly to Step III. A grievant also may file a grievance directly to Step III regarding his/her removal as a housing unit

representative by the Warden or CFA Deputy Director pursuant to PD 04.01.150 "Prisoner Housing Unit Representatives/Warden's Forum". In such cases, the Step III grievance must be sent to the Prisoner Affairs Section within the time frame set forth in Paragraph X for filing Step I grievances. Upon receipt, the grievance shall be carefully reviewed to determine whether to respond directly to the grievance, request an investigation into the issue raised in the grievance, or return it to the grievant for filing at Step I.

T. A grievant shall use the Prisoner/Parolee Grievance form (CSJ-247A) to file a Step I grievance and to file a grievance directly with the Prisoner Affairs Section pursuant to Paragraph S; the Prisoner/Parolee Grievance Appeal form (CSJ-247B) shall be used to file a Step II or Step III grievance. The forms may be completed by hand or by typewriter however, handwriting must be legible. The issues shall be stated briefly. Information provided shall be limited to the facts involving the issue being grieved (i.e., who, what, when, where, why, how). Dates, times, places and names of all those involved in the issue being grieved are to be included. Information shall be confined to the form and shall not be written on the back, sides or margins of the form, or in the response area. Additional pages may be attached to the grievance form if necessary to provide required information; however, grievants are encouraged to limit the information to the grievance form. If additional pages are necessary, the grievant

shall submit four copies of each additional page; grievance forms shall not be used for this purpose. Prisoners in a CFA institution may use an interdepartment mail run, if available, to send a grievance to another facility. If an interdepartment mail run is not available and the prisoner does not have sufficient funds to mail the grievance, postage shall be loaned as set forth in PD 05.03.118 "Prisoner Mail".

U. Time limitations shall be adhered to by the grievant and staff in all steps of the grievance process. Grievances and grievance appeals at all steps shall be considered filed on the date sent by the grievant. The total grievance process from the point of filing a Step I grievance to providing a Step III response shall be completed within 90 calendar days unless an extension has been approved in writing by the Grievance Coordinator or the Prisoner Affairs Section at one of the steps in the grievance process. An extension shall not exceed 15 business days. The Grievance Coordinator or, at Step III, the Prisoner Affairs Section shall immediately notify the grievant in writing whenever an extension has been approved; the extension also shall be noted in the grievance response.

V. If a grievant chooses to pursue a grievance which has not been responded to by staff within required time frames, including any extensions granted, the grievant may forward the grievance to the next step of the grievance process within ten business days after the

response deadline expired, including any extensions which have been granted.

W. Prisoners and staff who may be involved in the issue being grieved shall not participate in any capacity in the grievance investigation, review or response, except as necessary to provide information to the respondent.

Step I

X. Within five business days after attempting to resolve a grievable issue with staff, a grievant may send a completed Prisoner/Parolee Grievance form (CSJ-247A) to the Step I Grievance Coordinator designated for the facility, field office or other office being grieved. If the office being grieved does not have a designated Grievance Coordinator, the grievant shall send the grievance to the Step I Grievance Coordinator for the facility in which s/he is housed or appropriate field office for processing.

Y. The Grievance Coordinator shall log and assign a unique identifying number to each Step I grievance received, including those which may be rejected. Where available, the Grievance Coordinator shall use a computerized grievance tracking system for this purpose. The Grievance Coordinator shall determine if the grievance should be rejected pursuant to this policy and, if so, sign and return the grievance to the grievant with an explanation as to why it was rejected. In CFA, if the grievance is being rejected because it

presents a non-grievable issue, the Grievance Coordinator's supervisor shall review the reason for the rejection to ensure it is in accordance with policy; both the Grievance Coordinator and the supervisor are required to sign the grievance before returning the grievance to the grievant. If the grievance is accepted, the Grievance Coordinator shall assign an appropriate respondent and identify the date by which the response is due. The due date shall be within 15 business days after receipt of the grievance, unless an extension is granted pursuant to Paragraph U. If the issue is of an emergent nature, the Grievance Coordinator may order a Step I response within two business days. The Grievance Coordinator may respond at Step I to grievances which require only minimal investigation or rejected for reasons authorized by this policy. However, if the Grievance Coordinator responds to the merits of the grievance, a grievance interview must be conducted as required in Paragraph AA.

Z. The respondent assigned pursuant to Paragraph Y shall generally be the supervisor of the person being grieved. The OPH Administrator shall designate a respondent for grievances involving OPH hearing officers and hearings conducted by OPH. The respondent for grievances involving the Parole Board shall be designated by the Parole Board Chairperson.

AA. The respondent shall interview the grievant unless s/he refuses to participate in the

interview, the respondent is not assigned to the location at which the grievant is confined, or, if the grievant is on parole in the community, the respondent does not have ready access to the field office to which the grievant is assigned. If the grievant is not interviewed, the reason shall be included in the written response to the grievance. The grievant shall have the opportunity to explain the grievance more completely at the interview, enabling the Step I respondent to gather any additional information needed to respond to the grievance. The interview also provides the opportunity to resolve the grievance to the mutual satisfaction of the grievant and the Department.

BB. The respondent shall identify in the response the policies, rules or procedures that are directly related to the issue or conduct being grieved. Each Step I grievance response shall be reviewed by the respondent's supervisor prior to the grievance being returned to the Step I Grievance Coordinator to ensure that it appropriately addresses the issue raised in the grievance and accurately reflects Department policy and procedure. Where there is limited staffing in an FOA field office, corrections center or TRV, the requirement for supervisory review of a Step I response shall not apply if the response is prepared by an FOA supervisor/manager.

CC. The Step I Grievance Coordinator shall ensure that a thorough investigation was completed

for each Step I grievance accepted, that the response was reviewed by the appropriate supervisor and that a copy of the response is provided to the grievant by the due date, including any extension granted.

Step II

DD. If a grievant is dissatisfied with the response received at Step I or does not receive a timely response, s/he may request a Prisoner/Parolee Grievance Appeal form (CSJ-247B) from the Step I Grievance Coordinator within five business days after receiving the Step I response or, if no response was received, within five business days after the date the response was due, including any extensions. The grievant must send the completed form CSJ-247B to the Step II Grievance Coordinator designated for the facility, field office or other office being grieved within five business days after receiving the CSJ-247B from the Step I Grievance Coordinator. If the office being grieved does not have a designated Grievance Coordinator, the grievant is to send the grievance to the Step II Grievance Coordinator for the facility in which s/he is housed or appropriate field office for processing.

EE. The Grievance Coordinator shall log each Step II grievance received, including those which may be rejected. Where available, the Grievance Coordinator shall use a computerized grievance tracking system to do so. The Grievance Coordinator shall

determine if the grievance should be rejected pursuant to this policy and, if so, return the grievance to the grievant with an explanation as to why it was rejected. If accepted, the Grievance Coordinator shall assign an appropriate respondent and indicate the date by which the response is due. The due date shall be within 15 business days after receipt of the grievance, unless an extension is granted as set forth in Paragraph U.

FF. The respondents for Step II grievances shall be as follows:

1. The Warden in CFA and SAI facilities, except that s/he may delegate this responsibility to the appropriate Deputy Warden if more than one institution is supervised. If the Warden supervises a camp, s/he may delegate this responsibility for camp grievances to the Assistant Deputy Warden at the camp.

2. The appropriate Area Manager for FOA area offices, corrections centers and TRVs.

3. The Regional Health Administrator or designee in grievances alleging inadequate medical care.

4. The Administrator of Michigan State Industries or designee for grievances involving that Bureau.

5. The OPH Administrator for grievances involving that Office.

6. The Parole Board Chairperson for grievances involving the Parole Board.

7. The Administrator of the Office of Field Programs for grievances involving that office.

8. The CFA Region III Business Manager for grievances involving administrative support functions for CFA facilities in Jackson.

GG. The Grievance Coordinator shall ensure that any additional investigation was completed as necessary for each Step II grievance accepted and that a copy of the response is provided to the grievant by the due date, including any extensions granted pursuant to Paragraph U.

Step III

HH. If a grievant is dissatisfied with the response received at Step II or does not receive a timely response, s/he may send a completed Step III grievance to the Prisoner Affairs Section. The form must be sent within ten business days after receiving the Step II response or, if no response was received, within ten business days after the date the response was due, including any extensions. A grievant also may file a grievance directly to Step III in accordance with Paragraph S.

II. The Prisoner Affairs Section shall be the respondent for Step III grievances on behalf of the Director. Each grievance received at Step III, including those which may be rejected, shall be logged on a computerized grievance tracking system. The tracking system shall include information on the subject matter of each grievance received and, for rejected grievances, the basis for the rejection. The Prisoner Affairs Section shall forward grievances regarding medical care or treatment filed against health care staff, including contractual staff, to the Administrator of the Bureau of Health Care Services (BHCS). The BHCS Administrator shall ensure the grievance is investigated and a response provided to the Prisoner Affairs Section in a timely manner. The Manager of the Prisoner Affairs Section shall ensure that any additional investigation is completed as necessary for each Step III grievance accepted and that a copy of the Step III response is provided to the grievant by the due date, including any extensions granted pursuant to Paragraph U.

MODIFIED ACCESS

JJ. A prisoner or parolee who files an excessive number of grievances which are frivolous, vague, duplicative, raise non-grievable issues, or contain prohibited language as set forth in Paragraph G, or is found guilty of misconduct for filing an unfounded grievance as set forth in Paragraph L, may have access to the grievance process limited by the Warden or FOA Area Manager for an initial period of not

more than 90 calendar days. If the prisoner or parolee continues to file such grievances while on modified access, the Warden or FOA Area Manager may extend the prisoner's or parolee's modified access status for not more than an additional 30 calendar days for each violation. In CFA, a recommendation to place a prisoner on modified access shall be submitted only by the Grievance Coordinator, with approval of his/her supervisor, and shall include a list of the grievances forming the basis for the recommendation and the reason for the recommendation; both the Grievance Coordinator and supervisor shall sign the recommendation.

KK. The Warden or FOA Area Manager, as appropriate, shall ensure that a prisoner or parolee placed on modified access, or who has had that status extended, is immediately notified in writing of this determination. The Warden or FOA Area Manager also shall immediately notify the Prisoner Affairs Section in writing whenever s/he places a prisoner or parolee on modified access or extends that status.

LL. The Manager of the Prisoner Affairs Section also may place a prisoner or parolee on modified access, or extend that status, for the reasons set forth in Paragraph JJ. The Manager of the Prisoner Affairs Section shall ensure that each prisoner or parolee placed on modified access or who has that status extended is immediately notified in writing of that determination. The Manager of the

Prisoner Affairs Section also shall ensure that the appropriate Warden or FOA Area Manager is notified in writing of the determination.

MM. While on modified access, the prisoner or parolee shall be able to obtain grievance forms only through the Step I Grievance Coordinator. A grievance form shall be provided if the Step I Grievance Coordinator determines that the issue the prisoner or parolee wishes to grieve is grievable and otherwise meets the criteria outlined in this policy. The Grievance Coordinator shall maintain a record of requests received for grievance forms and whether the request was approved or denied and, if denied, the reason for the denial. If a prisoner or parolee on modified access attempts to file a grievance using a form not provided by the Grievance Coordinator, the prisoner or parolee shall be notified that the grievance will not be processed. The Warden, FOA Area Manager or Manager of the Prisoner Affairs Section may extend the prisoner's or parolee's modified access status for not more than an additional 30 days for each violation. Notification of such extensions shall be consistent with the requirements set forth in Paragraphs KK and LL.

NN. A prisoner or parolee shall remain on modified access for the approved period even if transferred to another facility or field location. The Grievance Coordinator for the sending facility or field location shall ensure that the Grievance Coordinator for the receiving

facility or field location is notified of this information.

OPERATING PROCEDURE

OO. The OAIAL Administrator shall ensure that procedures are developed as necessary to implement requirements set forth in this policy directive no later than December 19, 2003. This requirement includes ensuring that their existing procedures are revised or rescinded, as appropriate, if inconsistent with policy requirements or no longer needed.

AUDIT ELEMENTS

PP. A Primary Audit Elements List has been developed and will be provided to Wardens, the SAI facility Administrator, FOA Regional Administrators and the OAIAL Administrator to assist with self audit of this policy, pursuant to PD 01.05.100 "Self Audit of Policies and Procedures".

PLC/OPH/12-08-03

(9) (8)

Nos. 05-7058 and 05-7142

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

LORENZO L. JONES,
Petitioner,

v.

BARBARA BOCK, *et al.*,
Respondents.

TIMOTHY WILLIAMS,
Petitioner,

v.

WILLIAM OVERTON, *et al.*,
Respondents.

JOHN H. WALTON,
Petitioner,

v.

BARBARA BOUCHARD, *et al.*,
Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

I. THE SIXTH CIRCUIT'S "PLEAD AND SHOW EXHAUSTION" RULE IS INCONSISTENT WITH THE FEDERAL RULES OF CIVIL PROCEDURE AND FINDS NO SUPPORT IN THE PLRA'S TEXT OR STRUCTURE OR SETTLED PRINCIPLES OF ADMINISTRATIVE AND HABEAS LAW 5

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REPLY BRIEF FOR THE PETITIONERS

The court of appeals affirmed the dismissal of petitioners' complaints by applying rules that require prisoners (1) to plead and show, either with specific allegations or documentary evidence, that they exhausted their claims; (2) to have identified in their underlying administrative grievances each individual whom they later sue in federal court, regardless when the prisoner learned that individual's identity or in what capacity (e.g., as a supervisory defendant) the prisoner seeks to sue them; and (3) to ensure that every claim in their complaints is fully exhausted, lest their entire complaints be dismissed despite the presence of exhausted claims. Each of these rules defies the standard norms of federal practice and procedure embodied in the Federal Rules of Civil Procedure that, by the Rules' own terms, apply to prisoner civil rights suits, see Fed. R. Civ. P. 1 (stating that the Federal Rules "govern procedure in all suits of a civil nature"). And while statutes may require what the Federal Rules do not, Congress' enactment of the Prison Litigation Reform Act (PLRA), Pub. L. 104-134, 110 Stat. 1321 (1996), did not mandate the rules applied by the Sixth Circuit in these cases. If the PLRA was intended to mark such a radical change as to how prison civil rights cases would be litigated, one would expect to find a "clear expression of congressional intent to exempt actions brought under that statute from the operation of the Federal Rules of Civil Procedure." *Califano v. Yamasaki*, 482 U.S. 682, 700 (1979). But there is none.

The PLRA's exhaustion requirement is terse, stating only that "[n]o action shall be brought * * * until such administrative remedies as are available are exhausted." 42 U.S.C. 1997e(a). The PLRA's other provisions say nothing about the parties' respective pleading burdens, the quantum or nature of the information that prisoners must include in their administrative grievances, or how a federal court should deal with complaints containing both exhausted and unexhausted claims. To this end, even those courts espousing the rules applied by the Sixth Circuit admit that they have been unable to firmly ground the

rules in the PLRA's text. See, e.g., *Kikumura v. Osagie*, 461 F.3d 1269, 1287 (CA10 2006) (acknowledging that its "total exhaustion" rule was adopted "not because it was dictated by the statutory language, but because 'the policies of the PLRA * * * support'" the rule (quoting *Ross v. County of Bernalillo*, 365 F.3d 1181, 1190 (CA10 2004))); *Steele v. Federal Bureau of Prisons*, 355 F.3d 1204, 1207 (CA10 2003) (acknowledging that the PLRA does not "directly address[]" the parties' respective pleading burdens), cert. denied, 125 S.Ct. 344 (2004); cf. *Curry v. Scott*, 249 F.3d 493, 505 (CA6 2001) (offering no textual support for its "name all defendants" rule).

Similarly unable to find direct and meaningful support for the Sixth Circuit's rules in the PLRA's text, respondents defend them by either cobbling together unrelated provisions of the PLRA – themselves unhelpful in justifying the Sixth Circuit's rules – piling inference upon inference based on hyper-technical and flawed readings of the statute's terms or by arguing that the Sixth Circuit's rules are necessary, as a matter of policy, to vindicate Congress' goal of "reduc[ing] the quantity and improv[ing] the quality of prisoner suits." *Porter v. Nussle*, 534 U.S. 516, 524 (2002). In doing so, however, respondents ignore the "cardinal canon" of statutory construction, *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992), that when a provision is not fairly contained in a statute's language, the Court will not, in pursuit the statute's alleged policy, "engraft" it, *United States Dep't of Justice v. Landano*, 508 U.S. 165, 181 (1993); see also Pet. Br. 27-28.

Even when courts give a statute "a nonliteral reading," they will do so only when that reading "is more faithful to the actual intent of the enacting Congress." *Caldwell v. Quarterman*, — S.Ct. —, 2006 WL 2861670, *1 (Oct. 10, 2006, (Stevens, J., respecting denial of cert.) (citing, *inter alia*, *Woodford v. Ngo*, 126 S.Ct. 2378 (2006)). But neither the PLRA's exhaustion provision nor the PLRA as a whole evidences any intention to create the rules applied by the Sixth Circuit here, and

respondents do not seriously contend that the Sixth Circuit's rules are supported by the PLRA's legislative history.[1]

While it is clear that Congress sought to "reduce the quantity and improve the quality of prisoner suits," *Porter*, 534 U.S. at 525, it is also clear that Congress was not willing to enact "whatever furthered" those objectives, *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam) (because "no legislation pursues its purposes at all costs," "it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law."); see also *ibid.* ("Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice."). Had that been the sole purpose of the statute, Congress could simply have barred all prisoner litigation from the federal courts (leaving state courts as the only forum for prisoners), or imposed its own procedural traps, such as the three rules created by the Sixth Circuit and applied to petitioners' cases. That was not the sole purpose, however: the backers of the legislation made clear that they wanted to reduce prisoner lawsuits but to do so in a way that did not "prevent inmates from raising legitimate claims. * * * [T]his legislation will not prevent those claims from being raised." 141 Cong. Rec. S14627 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch).

A fair description of the legislative compromise embodied in the statute would have to recognize that it was important to Congress not to go too far, and that the statutory purpose was "to reduce the volume and improve the quality of inmate litigation while not preventing inmates from pursuing legitimate claims." The three rules at issue here, which fall equally on meritorious and non-meritorious claims and work

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[1] To the extent respondents do so contend, those arguments are simply recycled editions of their policy arguments masquerading as legislative history arguments.

synergistically to trap and punish prisoners by dismissing their entire complaints if they offend any one rule, may serve the purpose of reducing the volume of inmate litigation. But they do little – if anything – to improve the quality of inmate litigation and would clearly have been contrary to the purpose of preserving legitimate claims – particularly, given their pernicious interaction. See ACLU Br. 35-37.

Recognizing that Congress likely had other preexisting exhaustion regimes in mind when it enacted the PLRA, this Court has sensibly looked first to administrative law and secondarily to habeas law for guidance in interpreting the PLRA's exhaustion requirement.[2] Critically, however, none of the Sixth Circuit's rules at issue in these cases are reflective of common practice in administrative or habeas law. Absent any indication that Congress intended PLRA exhaustion to carry with it such novel corollaries, it is not surprising that each of them has been rejected by the majority of the courts of appeals to have considered them and that, in the seven months since this Court granted certiorari, even the Sixth Circuit has candidly questioned one[3] and expressly disavowed another.[4]

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[2] The Court recently said that "[i]t is unrealistic * * * to infer from the wording of the PLRA['s exhaustion] provision that Congress framed and adopted that provision with habeas law and not administrative law in mind. Indeed, the wording of the PLRA provision is strikingly similar to our description of the doctrine of administrative exhaustion." *Ngo*, 126 S.Ct. at 2392. On the other hand, it said that "[e]xhaustion is an important doctrine in both administrative and habeas law, and we therefore look to those bodies of law for guidance." *Id.* at 2384.

[3] In *Owens v. Keeling*, the Sixth Circuit acknowledged that this Court's "recent reiteration, in the context of a § 1983 *prisoner* claim, that '[s]pecific pleading requirements are mandated by the Federal Rules of Civil Procedure, and not, as a general rule, through case-by-case determinations of the federal courts,' again calls into question our PLRA exhaustion-pleading requirements." 461 F.3d 763, 768 n.1 (CA6 2006) (quoting *Hill v. McDonough*, 126 S.Ct. 2096, 2103 (2006), and discussing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512-13 (2002)).

I. THE SIXTH CIRCUIT'S "PLEAD AND SHOW EXHAUSTION" RULE IS INCONSISTENT WITH THE FEDERAL RULES OF CIVIL PROCEDURE AND FINDS NO SUPPORT IN THE PLRA'S TEXT OR STRUCTURE OR SETTLED PRINCIPLES OF ADMINISTRATIVE AND HABEAS LAW

In both administrative law and habeas law, non-exhaustion is an affirmative defense to be pleaded and established by the defense. E.g., *Day v. McDonough*, 126 S.Ct. 1675, 1678, 1682 (2006) (habeas); *Felder v. Casey*, 487 U.S. 131, 157 (1988) (administrative law); see also Pet. Br. 34-36. Respondents offer no principled reason why exhaustion under the PLRA should be any different.

Respondents argue that the PLRA itself not only shifted the burden of alleging exhaustion to PLRA plaintiffs but also that it created the additional heightened pleading requirement applied by the Sixth Circuit in petitioner Jones' case. See generally Resp. Br. 30-44. Critically, however, neither the PLRA nor its legislative history says anything about pleading exhaustion – much less, pleading it with specificity, as respondents concede. So constrained, respondents argue instead that heightened pleading is "inherent in the statute." Resp. Br. 34. Respondents are mistaken.

The PLRA's exhaustion provision states simply that "[n]o action shall be brought * * * until such administrative remedies as are available are exhausted." 42 U.S.C. 1997e(a). That

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[4] As petitioners noted in their opening brief (at 7-8 n.2), in *Spencer v. Bouchard*, 449 F.3d 721, 726 (CA6 2006); see also *Owens*, 461 F.3d at 768; *Bell v. Konteh*, 450 F.3d 651, 654 n.5 (CA6 2006), the Sixth Circuit recently acknowledged the faulty underpinnings of and refused to follow the total exhaustion holding of *Jones-Bey v. Johnson*, 407 F.3d 801 (CA6 2005), pet. for cert. pending, No. 05-874 (filed Jan. 9, 2006).

language implies nothing about the burden of pleading. The "no action shall be brought" language of § 1997e(a) is typical of statutes of limitation. See, e.g., *Beach v. Ocwen Federal Bank*, 523 U.S. 410, 416 (1998) ("[M]ost statutes of limitation provide either that 'all actions * * * shall be brought within' or 'no action * * * shall be brought more than' so many years after 'the cause thereof accrued.'"). Statutes of limitation are expressly an affirmative defense under Federal Rule of Civil Procedure 8(c), and this Court has likened non-exhaustion to the statute of limitation defense for pleading purposes, see *Day*, 126 S.Ct. at 1678, 1682 (describing "exhaustion of state remedies" in the habeas context as an affirmative defense and likening it to "the statute of limitations defense"). In light of this Court's repeated holdings that non-exhaustion is an affirmative defense in analogous regimes and this Court's recognition that the non-exhaustion and the statutes of limitation defenses operate similarly, there is no basis to view PLRA exhaustion any differently absent a clear statement by Congress to that effect.

Respondents assert that the Sixth Circuit's heightened pleading requirement "effectuates the PLRA's screening requirement," Resp. Br. 34, and that "courts would be prevented from efficaciously screening" without it,[5] *id.* at 22. Neither

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[5] As a practical matter, this is just not the case. No court within the overwhelming majority of circuits that treat PLRA exhaustion as an affirmative defense, see Pet. Br. 36 n.14 (collecting cases), has complained that it cannot screen cases effectively under Federal Rule of Civil Procedure 8(a)'s notice pleading standard, and respondents cite no evidence of a lack of effective screening in those courts.

Similarly misplaced is respondents' argument that courts should not "have to sort through each allegation of each complaint to determine which claims are exhausted and which are unexhausted." Resp. Br. 27. If exhaustion is an affirmative defense, courts will only have to "sort through" those allegations for which prison officials present a plausible claim of non-exhaustion. More generally, respondents essentially argue that adjudicators should not have to be bothered with adjudicating. Judicial resources may be scarce, but

assertion is correct. The PLRA contains three provisions that allow district courts to screen and dismiss a prisoner's claim that "(1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or (2) seeks monetary relief from a defendant who is immune from such relief." 28 U.S.C. 1915A; see also 28 U.S.C. 1915(e)(2); 42 U.S.C. 1997e(c)(1) & (2).[6] The PLRA also contains a provision that allows defendants to "waive the right to reply to any action brought by a prisoner." 42 U.S.C. 1997e(g)(1). Under this provision, a district court may require the defendants to reply to the prisoner's suit "if it finds that the plaintiff has a reasonable opportunity to prevail on the merits." *Id.* § 1997e(g)(2). According to respondents, treating non-exhaustion as an affirmative defense "proves too much" because, unless a prisoner pleads and shows exhaustion,

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> when we automatically close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests. And current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles.

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 411 (1971) (Harlan, J., concurring).

[6] Section 1915A requires screening of a prisoner's complaint "before docketing, if feasible or, in any event as soon as practicable after docketing." 28 U.S.C. 1915A(a). Section 1915(e)(2) allows screening "at any time" and also allows dismissal, notwithstanding the substance of a prisoner's claims, if the prisoner is proceeding *in forma pauperis* and his or her "allegation of poverty is untrue." 28 U.S.C. 1915(e)(2). Section 1997e(c) allows dismissal "on [the court's] own motion or on the motion of a party." 42 U.S.C. 1997e(c)(1). For purposes of judicial screening, these provisions are meaningfully indistinguishable; they all allow a district court, whenever it desires, to dismiss a prisoner's claims that are defective for any of the above-enumerated reasons.

courts following the PLRA's screening provisions and § 1997e(g) cannot determine whether the prisoner has "stated a claim on which relief may be granted" or "has a reasonable opportunity to prevail on the merits." Resp. Br. 17-22, 43. There are a number of critical flaws in respondents' reasoning.

First, the relationship Respondents posit between the exhaustion requirement of § 1997e(a) and the PLRA screening provisions does not exist. Respondents' expansive reading of the screening provisions conflates their requirement that courts screen-off and dismiss those claims that "fail[] to state a claim upon which relief may be granted," 28 U.S.C. 1915A(a); see also 28 U.S.C. 1915(e)(2); 42 U.S.C. 1997e(c), or reveal that a prisoner does not have "a reasonable opportunity to prevail on the merits," 42 U.S.C. 1997e(g), with a prisoner's duty to exhaust. But Congress did not say that. It could have easily done so by adding "or is unexhausted" to the end of these provisions' lists of bases for sua sponte dismissal. See Pet. Br. 39-41 (textual analysis demonstrating that Congress did not intend "failure to state a claim [to] include[] failure to exhaust"). But it did not. Indeed, *all* it said about exhaustion is that claims may be dismissed at screening without *requiring* exhaustion. 42 U.S.C. 1997e(c)(2). The presence of that statement makes the absence of exhaustion from the mandatory screening criteria that much more telling.

Second and relatedly, were this Court to embrace respondents' expansive reading of "fail to state a claim" and "reasonable opportunity to prevail on the merits," the PLRA's screening provisions and § 1997e(g) would swallow every claim in which a prisoner plaintiff does not affirmatively disprove in their complaint every possibly relevant affirmative defense. See Fed. R. Civ. P. 8(c) (enumerating nineteen specific affirmative defenses and requiring defendants to assert in their answer "any other matter constituting an avoidance or affirmative defense"). Without a clear statement from Congress, such an inversion of standard litigation practice and the specific terms of Federal Rule of Civil Procedure 9

(requiring plaintiffs to plead certain matters with specificity, but not including exhaustion – much less, PLRA exhaustion – among them) is simply too much to draw from the simple command of the PLRA's screening provisions and § 1997e(g) that district courts determine whether a prisoner has "failed to state a claim on which relief may be granted" or whether there is "a reasonable opportunity to prevail on the merits."[7]

Third, respondents' argument presumes that all unexhausted claims "fail to state a claim" or are incapable of providing a prisoner "a reasonable opportunity to prevail on the merits."

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[7] With respect to § 1997e(g) specifically, the lower courts have sensibly treated § 1997e(g) as summarizing the screening criteria set out at length in other sections and have directed defendants to reply to a complaint when it passes the initial screening prescribed by 28 U.S.C. § 1915(e)(2) and its companion screening provisions and is found to state a claim, not to be frivolous or malicious, and not to seek damages against an immune defendant. See, *e.g.*, *Childerson v. Illinois Dept. of Corrections*, No. 04-652-JPG, 2006 WL 2644941, *5 (S.D. Ill. Sep. 14, 2006) ("Defendants are ORDERED to timely file an appropriate responsive pleading to the complaint, and shall not waive filing a reply pursuant to 42 U.S.C. § 1997e(g)."); *Benavides v. Cambe*, No. 3:06-CV-522 RL, 2006 WL 2583705, *1 (N.D. Ind. Sep. 6, 2006) ("For the reasons set forth below, the Court * * * ORDERS, pursuant to 42 U.S.C. § 1997e(g)(2), that the Defendant respond to the complaint as provided for in the Federal Rules of Civil Procedure."); *Brown v. Williams*, No. 1:06-CV-0058-TCM, 2006 WL 1722274, *2 (E.D. Mo. June 20, 2006) ("Plaintiff's allegations * * * survive review under § 1915(e)(2)(B) and should not be dismissed at this time. See 28 U.S.C. § 1915A; 42 U.S.C. § 1997e(g)(2). Therefore, the Court will order that defendants * * * respond to the amended complaint."); *Bowers v. County of Schuyler*, No. 06-CV-6081L(P), 2006 WL 1650695, *2 (W.D.N.Y. June 5, 2006) ("IT HEREBY IS ORDERED, that plaintiff's request to proceed in forma pauperis is granted; * * * FURTHER, that pursuant to 42 U.S.C. § 1997e(g)(2), the defendants are directed to answer the complaint."); *Richardson v. Ortiz*, No. CIV S-05-2316 FCD CMK P, 2006 WL 2015513, *2 (E.D. Cal. July 17, 2006) ("If the allegations of the complaint are proven, plaintiff has a reasonable opportunity to prevail on the merits of this action."). The PLRA's screening provisions themselves do not make exhaustion a pleading requirement, and § 1997e(g) adds nothing to respondents' argument.

Not so. It is certainly true that after this Court's decision in *Ngo*, most unexhausted claims will not return to federal court because they will have been procedurally defaulted on timeliness grounds. But it is not the case that all unexhausted claims will be incapable of post-dismissal resuscitation. There remain some jurisdictions with sufficiently long grievance deadlines that a prisoner may be able to return to the grievance system, exhaust his or her remedies, and later return to federal court to present his potentially meritorious claim. See, e.g., North Carolina Dep't of Corr., *Rules and Policies Inmate Booklet*, § 20(6)(a) (Mar. 2002), *available at* http://www.doc.state.nc.us/Publications/inmate%20rule%20book.pdf (one-year grievance deadline); see also Pet. Br. 76-77 n.29. Even prisoners in jurisdictions with shorter deadlines may be able to resuscitate their unexhausted claims if their prison grievance administrators exercise discretion to entertain the untimely grievance. See Kermit Roosevelt III, *Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 Emory L.J. 1771, 1810 & n. 192 (2003) (observing that most grievance systems give administrators discretion to hear procedurally noncompliant grievances); see also Brief of the States of New York et al. as Amici Curiae in Support of the Petitioners at 6 n.4, *Woodford v. Ngo*, 126 S.Ct. 2378 (No. 05-416), *available at* 2005 WL 3598179 ("Some prison grievance procedures provide that prison officials may excuse untimely filings under defined circumstances."); Pet. Br. 76-77 n.29. Even more importantly, the PLRA "implicitly incorporates" a number of "well established exceptions to exhaustion." *Ngo*, 126 S.Ct. at 2393 (Breyer, J., concurring); see also Pet. Br. 62-63 n.24. Equating non-exhaustion with "failure to state a claim" or "no reasonable opportunity to prevail on the merits" at the judicial screening stage would preclude a federal court from ever entertaining a prisoner's assertion that he or she justifiably failed to exhaust. See, e.g., *Kaba v. Stepp*, 458 F.3d 678, 685-87 (CA7 2006) (holding that evidence of assaults and threats raised a factual question whether administrative remedies were actually available to a particular prisoner); *Giano v. Goord*, 380 F.3d 670, 678-79

(CA2 2004) (holding the failure to use the correct administrative remedy was justified by a lack of clarity in the rules governing prison remedies).

Equally misguided is respondents' reliance on qualified immunity. Respondents assert that the PLRA's screening provisions "are analogous to the law of qualified immunity" because, like the PLRA's requirement that prisoners have a "reasonable opportunity to prevail on the merits" before a court may order defendants to reply to a prisoner's complaint, qualified immunity "affords defendants 'an entitlement not to stand trial or face the other burdens of litigation.'" Resp. Br. 42 (quoting *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001)). But this Court has never wavered from its holding that qualified immunity is an affirmative defense to be pleaded and proven by the defense. See *Gomez v. Toledo*, 446 U.S. 635, 640 (1980) (holding that qualified immunity is one of Rule 8(c)'s "any other matter[s] constituting an avoidance or affirmative defense"); see also Pet. Br. 37. Thus qualified immunity refutes, rather than supports, respondents' argument that PLRA exhaustion must be pled by plaintiffs.

Respondents fare no better in relying on habeas rules of exhaustion pleading. They argue that the heightened pleading and judicial screening requirements embodied in the Rules Governing Section 2254 Cases in the United States District Courts (Habeas Rules) indicate that, "in order to screen cases under the PLRA, it too requires heightened pleading." Resp. Br. 42; see also *id.* at 51. But the Habeas Rules prove just the opposite. Under the Habeas Rules, as respondents acknowledge, district courts "must promptly examine" habeas petitions and dismiss them sua sponte without ordering a responsive pleading "if it plainly appears * * * that the petitioner is not entitled to relief." Habeas Rule 4; see also *Day*, 126 S.Ct. at 1683 (discussing Rule); *Felix v. Mayle*, 125 S.Ct. 2562, 2570 (2005) (same). Rule 2(c) requires habeas petitioners to "specify all the grounds for relief available to the petitioner" and "state the facts supporting each ground." This Court has

recognized that Rule 2(c)'s pleading requirement, like the requirement urged by respondents, is "more demanding" than Federal Rule of Civil Procedure 8's notice pleading standard. *Mayle*, 125 S.Ct. at 2570. Notwithstanding habeas' screening provision and express heightened pleading requirement, this Court has consistently characterized exhaustion as an affirmative defense in the habeas context, see *Day*, 126 S.Ct. at 1678, 1682; *Granberry v. Greer*, 481 U.S. 129, 132 n.5 (1987) ("[T]he answer to a habeas petition shall state whether the petitioner has exhausted his state remedies including any post-conviction remedies available to him under the statutes or procedural rules of the state." (quotation omitted)). Accordingly, even if the PLRA contained an express heightened pleading requirement like that in habeas – and it does not – importation of habeas rules into the PLRA regime would not include exhaustion among those matters subject to any heightened pleading requirement.

Even if PLRA plaintiffs were required to plead exhaustion, nothing in the PLRA requires them to plead it with specificity or demonstrate it with complaint attachments in the manner required by the Sixth Circuit. As explained in petitioners' brief, this Court rejected an invitation – just like respondents' – to impose a pleading requirement more demanding that Rule 8(a)'s notice pleading standard in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). There, the defendants argued that the requirements of a statutory scheme (in that case, Title VII) would be best served ("effectuated," in respondents' terms) by a pleading rule that requires more than Rule 8(a) does. The Court rejected that argument and properly recognized that "[a] requirement of greater specificity for particular claims is a result that 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'"[8] *Id.* at 515 (quoting

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[8] The Court's recent decision in *Hill v. McDonough*, 126 S.Ct. 2096 (2006), further evidences the Court's reluctance to impose heightened pleading requirements absent the clearest of congressional mandates. In *Hill*, also a § 1983 prisoner case, the Court reiterated that "[s]pecific

Leatherman v. Tarrant County Narcotics Intelligence & Coor. Unit, 507 U.S. 163, 168 (1993)); see also Pet. Br. 41-44. Respondents' claim that heightened pleading of exhaustion is "inherent" in the PLRA is the language of "interpretation" and therefore contrary to *Swierkiewicz*. Their reasoning from the supposed policies of the PLRA no more comprises an amendment of Rule 8(a) than did the *Swierkiewicz* defendants' argument concerning Title VII.

What is more, only four months before enacting the PLRA, the same Congress *did* unequivocally impose a heightened pleading requirement in another statute, the Private Securities Litigation Reform Act (PSLRA), Pub. L. 104-67, 109 Stat. 737 (1995), which shows what Congress does when it does intend to impose such a requirement. In section 101, Congress prescribed heightened pleading requirements for alleging misleading statements and omissions in securities fraud actions, mandating that:

> [T]he complaint shall *specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.*

15 U.S.C. 78u-4(b)(1)(B) (emphasis added). The statute further requires that if a plaintiff seeks to recover money damages based on proof that the defendant "acted with a particular state of mind * * * the complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity

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pleading requirements are mandated by the Federal Rules of Civil Procedure, and not, as a general rule, through case-by-case determinations of the federal courts." *Id.* at 2103.

facts giving rise to a strong inference that the defendant acted with the required state of mind." *Id.* § 78u-4(b)(2).

These provisions of the PSLRA clearly do amend or supersede Rule 8(a) in the specified class of cases, and they contrast sharply with Congress's silence in the PLRA concerning pleading of exhaustion.[9] In short, when Congress wants heightened pleading, it knows how to get it, and it failed to do so in the nearly contemporaneous PLRA.

This analysis is consistent with the more general principle that statutory repeals by implication are disfavored and will be found only where congressional intent is clear. See Pet. Br. 49-52. This principle has been applied explicitly to the Federal Rules of Civil Procedure.[10] Thus, in *Califano v. Yamasaki*, 482 U.S. 682 (1979), the Court rejected the argument that claims based on § 205(g) of the Social Security Act were exempted from the terms of Rule 23 of the Federal Rules of Civil Procedure, given Rule 1, which provides that the Rules "govern

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[9] Further, Congress told the courts what to do if the requirement was not met:

> (3) Motion to dismiss; stay of discovery
> (A) Dismissal for failure to meet pleading requirements
> In any private action arising under this chapter, the court shall, on the motion of any defendant, *dismiss the complaint if the requirements of paragraphs (1) and (2) are not met.*

15 U.S.C. 78u-4(c) (emphasis added).

[10] The Federal Rules are treated similarly to statutes for purposes of this sort of analysis. Rules promulgated by the judiciary pursuant to statutory delegation of power are "in every pertinent respect, as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1988) (referring to Federal Rules of Criminal Procedure); see also *Chambers v. NASCO, Inc.*, 501 U.S. 32, 66 (1991) (Kennedy, J., dissenting) (applying same principle to Civil Rules).

the procedure in the United States district courts in *all* suits of a civil nature." 482 U.S. at 700 (emphasis in original). Though the government (like respondents here) had a colorable argument based on certain language in the statute, the Court stated: "We do not find in § 205(g) the necessary *clear expression* of congressional intent to exempt actions brought under that statute from the operation of the Federal Rules of Civil Procedure." *Id.* (emphasis added); *accord*, *Marek v. Chesny*, 473 U.S. 1, 11-12 (1985) ("Nothing revealed in our review of the policies underlying [42 U.S.C.] § 1988 constitutes 'the necessary clear expression of congressional intent' required 'to exempt * * * [the] statute from the operation of' [Fed. R. Civ. P.] 68." (quoting *Califano*, 482 U.S. at 700)); *In re Davis*, 194 F.3d 570, 578, 579 (CA5 1999) ("*Califano v. Yamasaki* illustrates that the Federal Rules of Civil Procedure apply in all suits of a civil nature brought in federal court absent a *direct expression* by Congress of contrary intent * * * Absent a *direct expression* of Congress prohibiting a nondischargeability action by an administratrix, the normal rules of civil procedure, including Rule 17(a), are to be applied." (emphasis added)); *Reid v. White Motor Corp.*, 886 F.2d 1462 (CA6 1989) (applying *Califano* holding to bankruptcy proceeding, holding bankruptcy code's list of situations where proof of claim may be filed on behalf of a creditor was not exclusive and did not preclude claims under Rule 23).

While true that if statutes are in "irreconcilable conflict," the later-enacted governs, Resp. Br. 32 (citing *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976)), there is no such irreconcilable conflict here. The screening and dismissal provisions of the PLRA can function perfectly well – and do, in the majority of circuits – when the PLRA exhaustion requirement is treated as an affirmative defense and not a pleading – much less, a particularized pleading – requirement. Under that rule, screening operates on the substantive merits of the cases, and the question of exhaustion is left to be raised by the defendants. This result may frustrate respondents' desire for

a greater number of quick dismissals, but it does not conflict irreconcilably with anything that Congress clearly stated.

II. THE SIXTH CIRCUIT'S "IDENTIFY ALL DEFENDANTS" RULE IS INCONSISTENT WITH THE FEDERAL RULES OF CIVIL PROCEDURE AND FINDS NO SUPPORT IN THE PLRA'S TEXT OR STRUCTURE OR SETTLED PRINCIPLES OF ADMINISTRATIVE LAW

By freezing the universe of possible defendants at whatever grievance-filing deadline a particular institution employs, the Sixth Circuit's blanket rule that the PLRA's exhaustion provision requires prisoners to have identified in their underlying grievances each individual whom they later sue in federal court marks a radical departure from the Federal Rules' accommodating tradition of free amendments of complaints and permissive joinder to add new parties. See Pet. Br. 56; ACLU Br. 32-33. Like the Sixth Circuit and the one other circuit with this rule – the Eighth Circuit – respondents are unable to identify any textual support for this path-breaking rule. See *Thomas v. Woolum*, 337 F.3d 720, 734, 735 (CA6 2003); *Burton v. Jones*, 321 F.3d 569, 575 (CA6 2003); *Curry v. Scott*, 249 F.3d 493, 505 (CA6 2001); *Abdul-Muhammad v. Kempker*, 450 F.3d 350, 351-52 (CA8 2006); *Kozohorsky v. Harmon*, 332 F.3d 1141, 1143 (CA8 2003).

Instead, they argue, as a matter of policy, that requiring prisoners to identify each defendant "furthers the objectives of increasing the quality and decreasing the quantity of prisoner lawsuits" and "develop[s] the administrative record the PLRA requires." Resp. Br. 44. Merely requiring prisoners to "describe the problem," as petitioners have urged (Pet. Br. 58-59), would, according to respondents, "not develop the administrative record the PLRA requires" because "prison officials would be hard pressed to resolve the problem," thereby rendering the PLRA's exhaustion provision "meaningless" and "toothless" and "effectively turn[ing] the exhaustion

requirement into a 'useless appendage.'" Resp. Br. 44 (quoting *Ngo*, 126 S.Ct. at 2387). Respondents' parade of horribles ignores the well-documented inquisitorial nature of prison grievance proceedings and, in any event, is not implicated by these cases because each petitioner provided sufficient information in their Step I grievances to allow the Michigan Department of Corrections (MDOC) to develop a record, identify the proper individuals responsible for the conduct being grieved, and issue a final decision on the merits without any indication that the grievances were insufficiently specific.

As *amici* have shown, "prison officials do not decide grievances based solely on the characterization of who is responsible for the problem. Grievance policies overwhelmingly provide for investigation of prisoners' complaints." ACLU Br. 12. These investigations allow prison officials to broaden the scope or shift the focus of their inquiries. The MDOC Policy Directive (PD) in place when petitioners' filed their grievances was in accord. The MDOC expressly required at Step I that "[t]he grievant * * * be interviewed," Michigan Dep't of Corr. Policy Directive No. 03.02.130 ¶ (AA) (Nov. 1, 2000),[11] that "[t]he grievant * * * have the opportunity to explain the grievance more completely at the interview," *ibid.*, and "that a thorough investigation of the grievance is completed" *id.* ¶ (Q)(4). At Step II, the MDOC

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[11] The full-text of the PD effective when petitioners participated in the MDOC's grievance system is part of the record on appeal and is reproduced at pages 138 through 157 of the Joint Appendix. For simplicity, we cite to it throughout this brief as "PD00" followed by applicable paragraph, rather than by Joint Appendix page number. We likewise cite to the new PD (effective Dec. 19, 2003), which respondents included as an appendix to their brief, as "PD03" followed by applicable paragraph number.

allowed "further investigation * * * as needed." *Id.* ¶ (S)(4). The MDOC's new PD is also in accord.[12]

Respondents proffer the example of a prisoner whose grievance merely says, "Someone hurt me in my cell." Resp. Br. 44. While certainly preferable for the prisoner to have at least provided the date and time of the incident so prison officials could, learn the identities of the correctional officials on duty, audit any available video footage, or approximate the location of other inmates at the time, that information is not necessary under the inquisitorial model that prison grievance systems follow because prison officials can obtain that information during the prisoner's interview and then investigate and determine whether the prisoner's grievance is meritorious.

The PLRA exhaustion provision requires that a prison has been "afford[ed] * * * time and opportunity to address complaints internally," *Porter*, 534 U.S. at 524-25, and "'correct its own mistakes with respect to the programs it administers before it is haled into court,'" *Ngo*, 126 S.Ct. at 2385 (quoting *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992)). So long as a prisoner provides sufficient information to give the prison these opportunities – as all three did – the

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[12] The new PD still requires that prisoners be interviewed, PD03 ¶ (AA) ("The respondent shall interview the grievant."); see also *id.* ¶ (Y) ("[I]f the Grievance Coordinator responds to the merits of the grievance, a grievance interview must be conducted."), and that "[t]he grievant shall have the opportunity to explain the grievance more completely at the interview," *id.* ¶ (AA). These interviews "enable the Step I respondent to gather any additional information needed to respond to the grievance." *Ibid.* And, like the old PD, the new PD requires that the "Step I Grievance Coordinator * * * ensure that a thorough investigation was completed." *Id.* ¶ (CC). At Step II, "[t]he Grievance Coordinator shall ensure that any additional investigation was completed as necessary for each Step II grievance." *Id.* ¶ (GG). The same is true at Step III. *Id.* ¶ (II) ("The Manager of the Prisoner Affairs Section shall ensure that any additional investigation is completed as necessary for each Step III grievance.").

PLRA's exhaustion requirement is satisfied. Cf. *Spruill v. Gillis*, 372 F.3d 218, 234 (CA3 2004) (holding, under its procedural default rule that, "the prison can excuse an inmate's failure to [name someone in his grievance] by identifying the unidentified persons and acknowledging that they were fairly within the compass of the prisoner's grievance."). In contrast,

> [a] rule that penalizes inmates for failing to identify defendants as wrongdoers might undermine these goals by encouraging inmates to list in their grievances anyone who might possibly be involved in the alleged wrongdoing, rather than focusing on the most likely perpetrator or cause of their injury.

Kikumura, 461 F.3d at 1285; see also ACLU Br. 13.

Notwithstanding that Williams and Walton received final decisions on the merits of their grievances, respondents fault Williams for not naming Overton or Pramstaller in his grievances[13] and Walton for naming only Bobo and then suing five other individuals. Resp. 48. But as the record makes clear, Williams did not know Pramstaller's identity when he filed his grievance. Accordingly, when the MDOC denied Williams' Step II grievance appeal and identified Pramstaller as being responsible for denying Williams' surgery request, see JAII 15, Williams objected in his Step III appeal that "Dr. Pramstaller has never conducted personal exam on me," see JAII 14. Overton was the Director of the MDOC at the time that Williams filed his grievance, Resp. Br. ii, and, therefore, not directly involved in the denial of Williams' surgery request or the denial of Williams' requests for a handicapped-accessible cell but potentially liable under § 1983 as a supervisory

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[13] Williams had named all other defendants in his underlying grievances. See JAII 20-21 (Jamrog), 31-33 (Pass), 43-44 (Markwell), 50 (Klee), 54 (Peterson).

defendant. See, *e.g.*, *Williams v. Smith*, 781 F.2d 319, 323-24 (CA2 1986) (articulating standard for satisfying § 1983's personal involvement requirement for supervisory liability).

Walton plainly did not know when he filed his Step I grievance that Gearin was responsible for placing him on indefinite upper-slot restriction, lest he would have named him instead of Bobo. See JAII 65. But the MDOC cured this mistake when itself identified Gearin as being responsible for the grieved conduct. See id. at 66. Every other individual whom Walton sued, except Bouchard, the former warden of Walton's prison, either denied or approved the denial of one of Walton's grievances or grievance appeals. See id. at 66 (Gerth and Bauman), 68 (Bergh). They all, like Overton in Williams' case, were not directly involved in the conduct being grieved, but could be potentially liable as supervisory defendants. Most importantly, at the time Walton filed his Step I grievance, he did not know that it would be denied or who would participate in its denial. Accordingly, neither Williams' nor Walton's case presents the situation respondents posit where the prisoner need only "read a name tag" or "ask a prison official for a staff member's name."[14] Resp. Br. 47.

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[14] Although the "identify all defendants" issue is not implicated by petitioner Jones' case, respondents' reliance on his ability, in response to a district court order requiring him to name the two individuals he sued as "Health Care" Doe defendants, to "promptly" (Resp. Br. 47) marshal the identities of the two individuals – Konkle and Aldabaugh – he identified in his grievance as "Health Care," JAII 1-2, refutes rather than supports respondents' position. While it is unclear when Jones learned these individuals' identities, Jones' substitution of them for the Doe defendants occurred sixteen months after he filed Step I his grievance. Compare JAII 1-2 with JAI 20 n.2. The district court's recognition that Jones could properly substitute defendants whose identities he did not know either at the time he filed his Step I grievance or at the time he filed his complaint was properly and faithfully adherent to the Federal Rules' accommodating tradition of amendment and joinder.

Moreover, under the Sixth Circuit's and respondents' rule,[15] Williams is required to have named Director Overton and Walton to have named Warden Bouchard in their initial grievances – even though neither was directly involved in the grieved conduct – lest they forfeit their rights to sue them as supervisory defendants. For Williams to sue Pramstaller and Walton to sue Gearin, they would be required to file new grievances naming Pramstaller and Gearin specifically, even though the MDOC had already begun investigating Williams' and Walton's grievances, identified the relevant facts, and made the preliminary determinations that the grievances lacked merit.[16] For Walton to sue Gerth, Bauman, and Bergh, he would be required to file a second round of grievances challenging their denial of his first round of grievances.[17] Certainly, Congress, in enacting the PLRA's exhaustion provision, did not intend such absurd results, and this Court will not interpret a statute to produce an absurd result, especially where the plain language, structure, purpose, and history of the

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[15] Respondents assert that the MDOC's new policy "explicitly require[s] prisoners to name in their grievances those they intend to sue." Resp. Br. 15. Not so. The MDOC's new PD provides that "[d]ates, times, places and names of all those *involved* in the issue being grieved are to be included" in the prisoner's grievance. PD03 ¶ (T) (emphasis added). It does not, as respondents suggest, require prisoners to identify individuals in their grievances supervisory officials not directly involved in the issue being grieved or those individuals who may be liable under § 1983 for improperly denying a prisoner's grievance and allowing the grieved constitutional deprivation to continue.

[16] As *amici* demonstrated, it is not at all clear that the MDOC would have even accepted such a grievance. ACLU Br. 11-12 n.9. In any event, "requiring an inmate to file additional grievances concerning essentially the same facts whenever he discovers additional information would harm the efficiency and the finality of the grievance process." *Hooks v. Rich*, No. CV 605-065, 2006 WL 565909, *5 (S.D. Ga. Mar. 7, 2006).

[17] It is not difficult to imagine that the cycle could continue without limit – a sort of "Zeno's Paradox" where final resolution would never be reached.

provision do not support that interpretation. See *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982).

In any event, it is precisely because prison grievance systems follow an informal and inquisitorial – rather than adversarial – model that *Sims v. Apfel*, 530 U.S. 103, 111-12 (2000) (holding that "a judicially created" exhaustion requirement more demanding of a claimant than the agency's own regulations is "inappropriate" for informal, non-adversarial administrative proceedings), requires rejection of the Sixth Circuit's holdings that, *as a matter of federal statutory law*, prisoners must have identified all defendants. Although respondents attempt to distinguish *Sims*, those attempts are unavailing.

Respondents' argument that there was no statutory mandate for exhaustion in *Sims* is simply incorrect. (Resp. Br. 50). The Social Security Act provides that "[a]ny individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party * * * may obtain a review of such decision by a civil action" in federal court. 42 U.S.C. 405(g); see also *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 213 (1994) ("42 U.S.C. § 405(g) * * * requires exhaustion of administrative remedies before the denial of Social Security disability benefits may be challenged in district court"). Respondents further attempt to distance this case from *Sims* by asserting that "*Sims* turned on the fact that the Appeals Council had primary responsibility for choosing and elaborating on the issues." Resp. Br. 50. Respondents misread *Sims*. *Sims* "turned on" the overall informal and non-adversarial features of the Appeals Council proceedings, 530 U.S. at 111-12 (describing Appeals Council proceedings) – features which, as the above description and *Cleavinger v. Saxner*, 474 U.S. 193, 206 (1985) (describing prison grievance proceedings) make plain, prison grievance proceedings share.

Nor does *Ngo*, as respondents contend, "undercut" *Sims*' applicability. Resp. Br. 50. To the contrary, the two cases can

rest comfortably together, as at least two circuits that have rejected the Sixth Circuit's blanket "identify all defendants" rule have implicitly recognized. *Ngo* requires "proper exhaustion * * * which 'means using all steps that the agency holds out, and doing so *properly* (so that the agency addresses the issue on the merits).'" 126 S.Ct. at 2385 (quoting *Pozo v. McCaughtrey*, 286 F.3d 1022, 1024 (CA7), cert. denied, 537 U.S. 949 (2002)). *Sims* guards against courts requiring a claimant to do more than "us[e] all steps that the agency holds out." Both the Seventh and Tenth Circuits have, therefore, appropriately held that

> [w]hen the administrative rulebook is silent, a grievance suffices if it alerts the prison to the nature of the wrong for which redress is sought. As in the notice-pleading system, the grievant need not lay out the facts, articulate legal theories, or demand particular relief. All the grievance need do is object intelligibly to some asserted shortcoming.

Strong v. David, 297 F.3d 646, 650 (CA7 2002) (Easterbrook, J.); accord, *Kikumura*, 461 F.3d at 1283-84 (expressly following *Strong* and citing *Sims*).

III. THE SIXTH CIRCUIT'S "TOTAL EXHAUSTION" RULE IS INCONSISTENT WITH THE FEDERAL RULES OF CIVIL PROCEDURE AND FINDS NO SUPPORT IN THE PLRA'S TEXT OR STRUCTURE OR SETTLED PRINCIPLES OF ADMINISTRATIVE AND HABEAS LAW

Standard federal practice dictates that complaints containing "both good and bad claims" are cured by dismissal of "only the bad claims." *Robinson v. Page*, 170 F.3d 747, 748-49 (CA7 1999) (Posner, C.J.); see also Pet. Br. 64. The only statutory language to which respondents and their *amici* suggest is a clear congressional expression of intent to depart from this "fundamental procedural norm," *Robinson*, 170 F.3d at 748, is

the PLRA's use of the words "[n]o action shall be brought," 42 U.S.C. 1997e(a), in its exhaustion provision. Resp. Br. 53-54; States Br. 4. All of their remaining hyper-technical statutory arguments flow from the assumption that, by employing those words, Congress intended to not only make § 1997e(a) a dismissal provision but to mandate the Sixth Circuit's unforgiving "total exhaustion" rule.

But that assumption is fatally flawed. The reading of the word "action" urged by respondents and the States, as Judge Posner wrote in *Robinson*, would produce "a weird result that has no support in the language or purpose of the statute."[18] *Robinson*, 170 F.3d at 748; cf. *Shane v. Fauver*, 213 F.3d 113, 117 (CA3 2000) (Alito, J.) ("[T]he most natural reading of ["action" in] § 1997e(c)(1) is that it simply restates the proposition that is implicit in Rule 12(b)(6), *i.e.*, if a claim is based on facts that provide no basis for granting relief by the court, the *claim* must be dismissed." (emphasis in original)). As petitioners explained in their opening brief, § 1997e(a) establishes only that an action containing both exhausted and unexhausted claims is noncompliant. Pet. Br. 65. It does not direct district courts what to do with a noncompliant complaint.

Throughout numerous other areas of administrative law, courts have repeatedly interpreted mandatory exhaustion

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[18] Admittedly, Judge Posner was interpreting § 1997e(e) – not § 1997e(a). Both provisions, however, employ the "[n]o action shall be brought" language that respondents and the States champion as requiring the Sixth Circuit's "total exhaustion" rule. And the "'normal rule of statutory construction' that 'identical words used in different parts of the same act are intended to have the same meaning,'" requires that § 1997e(e) be consulted. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) (quoting *Dep't of Revenue v. ACF Indus., Inc.*, 510 U.S. 332, 342 (1994)). Respondents suggest that no court has ever rejected the argument that § 1997e(e) requires a mixed complaint to be dismissed in its entirety. Resp. Br. 65. Not so. At least one court outside the Seventh Circuit and, therefore, not bound by *Robinson* has done so, see *Libby v. Merrill*, No. Civ. 03-35-B-S, 2003 WL 21756830, *3-*4 (D.Me. Jul. 29, 2003), and petitioners are unaware of any case that has rejected *Robinson*.

provisions, like § 1997e(a), to require dismissal of only unexhausted claims in mixed complaints. See, e.g., *MacKenzie v. City and County of Denver*, 414 F.3d 1266, 1274 & n.13 (CA10 2005) (applying the exhaustion provision of the Americans with Disabilities Act, which states that "[n]o action * * * shall be brought * * * if administrative remedies have not been exhausted," 42 U.S.C. 6104(e)(2), without a total exhaustion rule); see also Pet. Br. 69 n.27 (collecting cases). And this Court has at least once allowed an exhausted claim, despite being bundled with an unexhausted claim, to go forward. See, e.g., *McKart v. United States*, 395 U.S. 185, 192-201 (1969) (allowing challenge to criminal prosecution based on defendant's failure to comply with Selective Service Class IV-A requirements, despite failure to exhaust prior Class I-A designation). To this end, the States' argument that dismissing only unexhausted claims results in a "toothless scheme" means that every other exhaustion scheme in federal jurisprudence is toothless. States Br. 13.

McNeil v. United States, 508 U.S. 106 (1993), and *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989), relied on by both respondents (at 58-60, 66) and the States (at 5), are not to the contrary. *McNeil* held that a Federal Tort Claims Act (FTCA) suit must be dismissed if the plaintiff exhausted administrative remedies only after filing suit. *McNeil* is irrelevant because there is no indication that *any* part of that case had been timely exhausted, or that the Court would have required dismissal of any timely exhausted claims. In fact, practice under the FTCA is to dismiss only claims that are unexhausted and allow exhausted claims to go forward, e.g., *Palay v. United States*, 349 F.3d 418, 425-27 (CA7 2003) – precisely the holding of the Second Circuit in *Ortiz v. McBride*, 380 F.3d 649 (CA2 2004), cert. denied, 125 S.Ct. 1398 (2005), that petitioners urge this Court to follow. Similarly, in *Hallstrom*, the Court held that the pre-filing notice requirement of the Resource Conservation and Recovery Act of 1976 was mandatory, and a post-filing notice could not prevent dismissal. As in *McNeil*, there was no suggestion that timely notice had

been given as to any claim in the case, and therefore no ruling on the instant question, whether a partially compliant suit must be dismissed in its entirety.

Moreover, as explained above, "most statutes of limitation provide either that 'all actions * * * shall be brought within' or 'no action * * * shall be brought more than' so many years after 'the cause thereof accrued,'" *Beach v. Ocwen Federal Bank*, 523 U.S. at 416, yet neither respondents nor the States cite any case – and petitioners are unaware of any cases – holding that a complaint containing both timely and stale claims must be dismissed in its entirety.

Because § 1997e(a) is unhelpful in elucidating how courts should address mixed PLRA complaints, the PLRA's dismissal provisions, 42 U.S.C. § 1997e(c)(1) and (2), are "the place where we would expect to find guidance as to whether dismissal of 'mixed actions' is required." *Ortiz*, 380 F.3d at 657. But as petitioners demonstrated at length in their opening brief (at 67-69), neither dismissal provision evidences Congress' clear intention to deviate from the "fundamental procedural norm" that "only the bad claims are dismissed." *Robinson*, 170 F.3d at 748-49. Respondents and the States counter that the Sixth Circuit's "total exhaustion" rule "is comfortably included within § 1997(e)(c)'s dismissal provisions" because § 1997e(c)(1) allows dismissal of "frivolous" actions and "a mixed action is legally frivolous." States Br. 6; see also Resp. Br. 62 (describing mixed actions as "failing to state a claim"). Not only is the suggestion that a non-frivolous claim is rendered frivolous or "fails to state a claim" because it is bundled with an unexhausted claim facile bootstrapping, it stretches the established understanding of "frivolous" beyond recognition and ignores that both terms necessarily describe the substantive merits of a claim, which as discussed above, may be meritorious and capable of eventually providing relief even if unexhausted.

Respondents and the States fare no better under habeas law. Although the comity and judicial efficiency considerations are

different in the habeas and civil rights context, see *Ortiz*, 380 F.3d at 660-63, even a wholesale incorporation of habeas exhaustion doctrine into the PLRA would not produce the extreme version of the "total exhaustion" rule urged by respondents and the States.

Habeas petitioners are afforded the opportunity to amend their complaints and go forward with exhausted claims. See *Rose v. Lundy*, 455 U.S. 509, 520 (1982) (a prisoner "can always amend the petition to delete the unexhausted claims, rather than returning to state court to exhaust all of his claims."); see also *Rhines v. Weber*, 544 U.S. 269, 279 (2005) ("[I]f a petitioner presents a district court with a mixed petition and the court determines that stay and abeyance is inappropriate, the court should allow the petitioner to delete the unexhausted claims and to proceed with the exhausted claims if dismissal of the entire petition would unreasonably impair the petitioner's right to obtain federal relief."); Randy Hertz & James L. Leibman, *Federal Habeas Corpus Practice & Procedure* § 23.5, at 1108 (5th ed. 2005). By contrast, respondents and the States take the unprecedented view that courts must dismiss an entire case because a single cause of action is unexhausted.[19] To the extent that Congress did intend to impose a "total exhaustion" rule, it could not have had the Sixth Circuit's far more draconian than the pre-existing habeas version in mind.

Nor is the Sixth Circuit's version supported by sound policy. Respondents' and the States' primary policy argument is that the Sixth Circuit's "total exhaustion" rule will create a kind of super-incentive to discourage prisoners from including any unexhausted claims in their complaints. Far from

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[19] Contrary to respondents and the States' argument (Resp. Br. 52; States Br. 15) that a PLRA "total exhaustion" rule will provide the same "a simple and clear instruction to potential litigants" in habeas *Rose*, 455 U.S. at 520, prisoners suing under the PLRA "cannot reliably predict whether courts will find their claims to be exhausted." ACLU Br. 26-27.

"reduc[ing] the quantity and improve[ing] the quality of prisoner suits," *Porter*, 534 U.S. at 528, a "total exhaustion" rule will only encourage prisoners to file each claim separately in order to avoid wholesale dismissal. As Judge McConnell recently wrote for the Tenth Circuit in *Kikumura*, "if we dismissed this action without prejudice, Mr. Kikumura would undoubtedly just drop the unexhausted claim from his complaint and file the action again, creating unnecessary docketing and assignment work for the district court." 461 F.3d at 1288. Because post-*Ngo*, the overwhelming majority of prisoners' unexhausted claims will not be capable of resuscitation, the Sixth Circuit's "total exhaustion" rule will largely result in is waste. That could not be what Congress intended.

CONCLUSION

For the foregoing reasons and those set forth in petitioners' opening brief, the judgments of the court of appeals should be reversed.

Respectfully submitted,

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LORENZO L. JONES,

Petitioner,

—v.—

BARBARA BOCK, *et al.*,

Respondents.

(caption continued on inside front cover)

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, ACLU OF MICHIGAN, THE LEGAL AID SOCIETY, JEROME N. FRANK LEGAL SERVICES ORGANIZATION, PRISON LEGAL NEWS, PRISON LEGAL SERVICES, PRISON AND CORRECTIONS SECTION OF THE MICHIGAN STATE BAR, OHIO JUSTICE & POLICY CENTER AND THE UPTOWN PEOPLE'S LAW CENTER IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

The statements of interest of the *amici curiae* are set forth in the Appendix.

SUMMARY OF THE ARGUMENT

In these cases, three prisoners presented their claims at each level of their prison grievance systems, received final decisions on the merits, and still their claims were dismissed for failure to exhaust administrative remedies. The dismissals were based on three Sixth Circuit rules—total exhaustion, pleading with specificity and naming each potential defendant in the grievance—that are judicially imposed, not drafted by state policymakers or prison officials to make the grievance process more effective or efficient. Thus, this case is not about deference to the judgment of prison officials.

Nor is it about deference to Congress. None of the Sixth Circuit's rules has any textual support in the PLRA and they do not further any of the purposes of the PLRA or of exhaustion generally. They neither weed out frivolous claims nor assist prison administrators in resolving complaints. Rather, they "serve no purpose other than the creation of an additional procedural technicality." *Love v. Pullman*, 404 U.S. 522, 526 (1972). Further, contrary to the policy of 42 U.S.C. § 1983 and the right of access to courts, each of the Sixth Circuit's rules imposes substantial, arbitrary barriers to meritorious lawsuits.

In *Woodford v. Ngo*, 126 S.Ct. 2378 (2005), the Court suggested a standard for evaluating exhaustion requirements that is appropriate here. First, are they

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[1] No counsel for any party authored any part of this brief. No persons or entities other than the *amici curiae* made any monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, copies of letters of consent to the filing of this brief were lodged with the Court by the parties on March 21 and 23, 2006.

necessary to provide prison officials a "fair opportunity" to resolve problems in their facilities? *Id.* at 2388. Second, do they provide prisoners "a meaningful opportunity" to exhaust their grievances and exercise their right of access to the courts? *Id.* at 2392.

Because the Sixth Circuit's rules neither help prison officials resolve problems nor allow prisoners adequate opportunity to obtain a ruling on the merits of their federal claims, the Court should reject each of them and adopt alternatives that are consistent with both the PLRA and § 1983. With respect to total exhaustion, the Court should either reject the total exhaustion rule outright or allow plaintiffs to amend their complaints to delete unexhausted claims so that district courts may consider the merits of those claims—and only those claims—that are fully exhausted. As an alternative to the "name all defendants" rule, the Court should require prisoners to give administrators notice of their *problems* so that the grievance can be fairly resolved. Finally, the Court should recognize, as most circuit courts have, that exhaustion of administrative remedies is an affirmative defense and not part of the plaintiff's claim. At a minimum, the Court must reject the Sixth Circuit's unique and unduly punitive ban on permitting amendment to cure defects in pleading.

If the Court allows these rules to stand, a prisoner's right to access the courts will be effectively eliminated. Since the Sixth Circuit's rules were imposed, *amici*'s research shows that only a tiny handful of prisoners have survived screening under 28 U.S.C. § 1915A. Congress could not have intended such a draconian result. "The exhaustion requirement is a gatekeeper, not a 'gotcha' meant to trap unsophisticated prisoners who must navigate the administrative process *pro se*." *Hooks v. Rich*, No. CV 605-065, 2006 WL 565909, *6 (S.D. Ga. Mar. 7, 2006).

ARGUMENT

I. THE SIXTH CIRCUIT'S RULES ARE SUPPORTED BY NEITHER THE LANGUAGE OF THE PLRA NOR ITS PURPOSES.

The Prison Litigation Reform Act provides that prisoners who wish to bring suit about prison conditions may do so only after "such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). This Court has held that when Congress required exhaustion, it meant "proper exhaustion . . . which 'means using all steps that the agency holds out, and doing so *properly* (so that the agency addresses the issues on the merits).'" *Woodford v. Ngo*, 126 S.Ct. 2378, 2385 (2006) (*quoting Pozo v. McCaughtry*, 286 F.3d 1022, 1024 (7th Cir. 2002)). Each of the three petitioners did exactly what *Woodford* requires and obtained a final decision from the agency that addressed the merits and did not reject the grievance on any procedural ground. The PLRA requires no more, and the courts are not authorized to throw up new obstacles to prisoners' access to courts as the Sixth Circuit has done in these cases.

A. The Sixth Circuit Has Invented New Exhaustion Requirements Without Any Textual Basis

Even courts espousing the rules requiring total exhaustion, pleading exhaustion with particularity and naming potential defendants recognize that nothing in the language of the PLRA mandates them. *E.g., Ross v. County of Bernalillo*, 365 F.3d 1181, 1190 (10th Cir. 2004) (stating that language of PLRA only "suggests" a total exhaustion requirement); *Steele v. Federal Bureau of Prisons*, 355 F.3d 1204, 1207 (10th Cir. 2003) (noting that pleading burden is not "directly addressed" in PLRA). With respect to the "name all defendants" rule, the PLRA places no content or

specificity requirements on grievances, much less requires that all potential defendants be named in a grievance. The Sixth Circuit has not even attempted to rely on statutory text to support its holding on this issue, instead citing the general purposes of the PLRA. *See Curry v. Scott*, 249 F.3d 493, 505 (6th Cir. 2001).

As to the rules requiring pleading with particularity and total exhaustion, the relationship between the language of the statute and the Sixth Circuit's conclusions is simply too tenuous and requires too many dubious inferences about Congressional intent to be considered a reasonable exercise in statutory interpretation. With respect to the total exhaustion rule, the Sixth Circuit relied heavily on 42 U.S.C. § 1997e(a), which states that no "action" relating to prison conditions may be "brought" before the prisoner exhausts her available administrative remedies. *Jones Bey v. Johnson*, 407 F.3d 801, 807 (6th Cir. 2005). But the reliance on this provision is misplaced. No one disputes that a partially exhausted "action" does not comply with the statute. The question is what to do about it. The command "to kill it rather than to cure it," *Ortiz v. McBride*, 380 F.3d 649, 657 (2d Cir. 2004), reflects an inferential non sequitur that is without support in the statutory language. If Congress had intended a total exhaustion rule, one would expect to find it in the provision governing dismissals, 42 U.S.C. § 1997e(c), but that section is silent on this issue. *Ortiz*, 380 F.3d at 657. Without an express command from Congress, courts should adhere to the "fundamental procedural norm," *Robinson v. Page*, 170 F.3d 747, 748-49 (7th Cir. 1999), that bad claims are dismissed but others are not. *Cf. Exxon Mobil Corp. v. Allapattah Services, Inc.*, 125 S.Ct. 2611, 2621 (2005) (rejecting "indivisibility" and "contamination" theories, under which jurisdictional defect for one claim or defendant would require entire action to be dismissed).

With respect to its heightened pleading burdens, the Sixth Circuit has merely stated that requiring prisoners to

plead exhaustion with particularity will help "effectuate" the exhaustion requirement of 42 U.S.C. § 1997e(a). *Knuckles El v. Toombs*, 215 F.3d 640, 642 (6th Cir. 2000).[2] But courts are not empowered to impose any extra-statutory requirement they believe somehow advances a statutory purpose; otherwise there would be no limit to the judicial gloss that they could place on a statute. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998) ("[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."); *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 495 n.13 (1985) ("[C]ongressional silence, no matter how 'clanging,' cannot override the words of the statute."). Because the statute is silent on pleading issues, courts should presume that Congress intended that exhaustion under the PLRA would be pled in the same way as exhaustion in other contexts—as an affirmative defense. *See Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 343 (1999) (stating that where Congress is silent, courts should not infer "significant change[s]" in law).[3]

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[2] The Sixth Circuit has also cited Congress' decision to make exhaustion mandatory rather than discretionary, *Brown v. Toombs*, 139 F.3d 1102, 1104 (6th Cir. 1998), but has failed to explain how this fact sheds any light on the proper allocation of pleading burdens. All affirmative defenses are "mandatory" in that the plaintiff cannot prevail if the defendant establishes them. Exhaustion is no different from a statute of limitations, which also requires plaintiffs to meet a condition before filing. Yet the burden to plead and prove the failure to satisfy a limitation period is generally placed on the defendant. Fed. R. Civ. P. 8(c). *See also Perez v. Wisconsin, Dep't of Corr.*, 182 F.3d 532, 536 (7th Cir. 1999) (likening exhaustion under PLRA to statute of limitations).

[3] For other contexts in which exhaustion of administrative remedies is a defense, see, e.g., *Granberry v. Greer*, 481 U.S. 129, 132 n.5 (1987); *Downey v. Runyon*, 160 F.3d 139, 146 (2d Cir. 1998); *Williams v. Runyon*, 130 F.3d 568, 573 (3d Cir. 1997); *Bowden v. United States*, 106 F.3d 433, 437 (D.C. Cir. 1997); *Brown v. Marsh*, 777 F.2d 8, 13 (D.C. Cir. 1985).

However, even if exhaustion is a pleading requirement for the plaintiff, there is no textual justification in the PLRA for overriding Fed. R. Civ. P. 8, which requires only notice of the claim, not the detailed allegations or document attachments required by the Sixth Circuit. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511-12 (2002); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993). In *Baxter v. Rose*, 305 F.3d 486, 489-90 (6th Cir. 2002), the Sixth Circuit belatedly insisted that its heightened pleading standards did not violate Rule 8 because the court's authority came from the PLRA's screening provision, 28 U.S.C. § 1915A. In essence, the Sixth Circuit has said that Congress repealed Rule 8 as it applies to prisoners in the context of exhaustion. But the PLRA does not say that. Rather, § 1915A changes only the *timing* for evaluating a complaint; nothing in those sections purports to change the pleading requirements for surviving that evaluation.

The Sixth Circuit's rules violate the federal rules in another way as well, by prohibiting prisoners from curing a pleading defect related to the court's heightened requirements for pleading exhaustion. *See* Fed. R. Civ. P. 15(a); 6 Charles Alan Wright, et al., *Federal Practice and Procedure* § 1474 (2d ed. 1990) ("Perhaps the most common use of Rule 15(a) is by a party seeking to amend in order to cure a defective pleading.").[4] Thus, the Sixth

[4] The only authority relied upon by the court of appeals in enforcing the "no amendment" rule in *Baxter* was *McGore v. Wrigglesworth*, 114 F.3d 601, 612 (6th Cir. 1997), which held without explanation that 28 U.S.C. § 1915(e)(2) prohibited district courts from allowing prisoner plaintiffs to amend their complaints to cure substantive deficiencies in the complaint. It appears that the court has assumed that the authority to dismiss a complaint sua sponte carries with it a prohibition on allowing a plaintiff to fix defects. But the court provides no authority for this assumption and it is inconsistent with basic fairness and common sense. Where a plaintiff is provided no notice or opportunity to be heard before his complaint is subject to dismissal, it becomes more not less imperative to provide the plaintiff with a second chance. And again,

Circuit has forgotten what this Court made clear nearly 50 years ago: "The Federal Rules reject the approach that pleading is a game of skill in which one misstep . . . may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley v. Gibson*, 355 U.S. 41, 48 (1957).

Generally, the Sixth Circuit's rules reflect not what the PLRA says, but what the court believes the statute *should* say. But courts may not invent requirements or limitations not included in the text of the statute, even if they believe that doing so is consistent with legislative intent. Congress enacts statutes, not purposes, and the Sixth Circuit's rules far outrun the statute it purports to apply.

B. The Sixth Circuit's Rules Are Contrary to the Purposes of the PLRA and Exhaustion in General

The purposes of the PLRA's exhaustion requirement can be essentially reduced to two: (1) reducing frivolous litigation; and (2) providing prison authorities with the opportunity to resolve problems prior to court intervention. *Porter v. Nussle*, 534 U.S. 516, 524-25 (2002); *Booth v. Churner*, 532 U.S. 731, 737 (2001). The Sixth Circuit's rules do not further either of these goals and, in some respects, are likely to frustrate them.

1. Affording prison officials an opportunity to resolve problems internally

In *Woodford*, 126 S.Ct. at 2385, the Court emphasized that a primary goal of the PLRA is to give

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because this is such a fundamental change in the normal rules of procedure, one would expect that Congress would have made such a change explicit. Not surprisingly, no other circuit has adopted this view.

prison administrators "a fair and full opportunity" to consider the grievance. None of the Sixth Circuit's rules implicates this concern because they are all *judicial* creations, not "critical procedural rules" of the prison. *Id.* at 2386.

a. Naming all defendants

i. Neither Michigan's nor most states' grievance procedures require prisoners to name potential defendants in their grievances.

The most obvious reason why a "name all defendants" rule is inappropriate in this case is that the Michigan grievance procedures at issue did not require or even ask that the prisoners provide this information in their grievance. A command to exhaust administrative remedies cannot be read to require more than the remedy itself requires. Neither the Michigan policy nor the form provided anticipates that a prisoner will file a grievance "against" a particular individual. Rather, the policy instructs prisoners to limit the information provided "to the *issue* being grieved." J.A., Vol. I, at 148 (emphasis added). *See also* J.A., Vol. I, at 1, 9, 20 ("be brief and concise in describing your grievance issue").[5] This is consistent with the vast majority of other state policies, including Sixth Circuit states Ohio, Kentucky and Tennessee, as well as the Federal Bureau of Prisons,

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[5] After the events relevant to this case, Michigan amended its policy to state, "[d]ates, times, places and names of all those involved in the issue being grieved are to be included" in the grievance. Michigan Dep't of Corr. Policy Dir. No. 03.02.130 (December 19, 2003). That revised policy is not at issue in this case. Even if it were, however, *amici* argue that it could not be enforced in these cases. *See discussion infra* at 44-45.

which also lack any requirement to identify potential defendants in a grievance.[9]

ii. Naming potential defendants is not necessary to give prison authorities a fair and full opportunity to consider the grievance.

The "name all defendants" rule fundamentally misses the point of PLRA exhaustion, which is to "afford[] *corrections officials* time and opportunity to address complaints internally before allowing the initiation of a federal case," *Porter*, 534 U.S. at 524-25 (emphasis added), or as the Court stated more recently, to "provide[] *prisons* with a fair opportunity to correct their own errors." *Woodford* 126 S.Ct. at 2387-88 (emphasis added). *Cf. Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (holding that federal habeas claims are exhausted if they were "fairly present[ed]" to state courts).

For this purpose, "it is not notice to individual actors that is important [in a grievance] but notice to the prison

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[9] *Amici* reviewed and collected grievance policies for nearly all states as well as the BOP. A complete list of all policies reviewed and links to the policies themselves are available at http://www.law.yale.edu/academics/williamswaltonjones.asp. Because prison and jail grievance policies sometimes are not published in a readily available form, and because in some jurisdictions they may be revised frequently, *amici* do not represent that these policies are the most current.

Generally, prison grievance procedures require only a short and plain statement of a prisoner's complaint. *See, e.g.*, Conn. Dep't of Corr. Admin. Dir. 9.6.10.C (March 5, 2003); Ind. Dep't of Corr. Policy No. 00-02-301 at 16 (December 1, 2005); R.I. Code R. 06 070 002 (B)(2) (2005); S.D. Dep't of Corr. Admin. Remedy for Inmates, 1.3.E.2 at 4 (August 22, 2005). Some policies explicitly instruct inmates to state their complaints briefly and avoid surplusage. *See, e.g.*, N.Y. Comp. Codes R. & Regs. tit. 7, § 701.16 (2005).

administration. The purpose of administrative exhaustion is not to protect the rights of officers, but to give prison officials a chance to resolve the complaint without judicial intervention." *Freeman v Berge*, No. 03-C-21-C, 2004 WL 1774737, at *3 (W.D. Wis. July 28, 2004); *see also Johnson v. Johnson*, 385 F.3d 503, 522 (5th Cir. 2004). Thus, so long as prisoners sufficiently identify the *problem* they are experiencing in their grievance, prison authorities will have a fair and full opportunity to act on the grievance.[7]

This view is supported by the fact, noted above, that most grievance procedures do not require prisoners to name staff members. If this information were as necessary as the Sixth Circuit suggests, prison policies would so prescribe. There are several good reasons why they do not.

First, the prisoner's identification of staff members is often beside the point, as when a grievance challenges a prison policy. For example, if a prisoner complains that letters from his family are being censored because they are written in a foreign language, and the basis for the censorship is a state-wide policy, *see Traini v. Michigan Dep't of Corr.*, No. S:04-CV-179, 2005 WL 2291214 (W.D. Mich. Sept. 20, 2005), whether or not the prisoner identifies the right policymakers will have no effect on the course of the investigation or consideration of the complaint. The same is true of many grievances challenging specific actions by prison staff.

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[7] *E.g., Johnson v. Johnson*, 385 F.3d 503, 517 (5th Cir. 2004) ("a grievance should be considered sufficient to the extent that the grievance gives officials a fair opportunity to address the *problem* that will later form the basis of the lawsuit") (emphasis added); *Johnson v. Testman*, 380 F.3d 691, 697 (2d Cir. 2004) ("inmates must provide enough information about the *conduct* of which they complain to allow prison officials to take appropriate responsive measures") (emphasis added); *Strong v. David*, 297 F.3d 646, 650 (7th Cir. 2002) ("All the grievance need do is object intelligibly to some asserted *shortcoming*.") (emphasis added).

Thus, Petitioner Williams did not name in his grievance the officials he later sued, but he did clearly identify the relevant problem, as was conceded by the defendants in the district court. J.A., Vol. I, at 83. Williams grieved that he was not receiving adequate medical care for his pain. Not surprisingly, the grievance examiners never stated that they needed Williams to identify the health unit manager or warden, who were later named as defendants, in order to evaluate whether they believed Williams was receiving sufficient care. J.A., Vol. II, at 9, 15, 17.[8]

Second, prison officials will rarely rely on the prisoner's identification of responsible staff members even when it might be relevant. Prison officials are in a much better position than prisoners to identify correctly the staff members responsible for a particular act or omission. Thus, in Petitioner Walton's case, the Level I grievance examiner explained that Walton had named the wrong person in his grievance. J.A., Vol. II, at 66. Even if the Michigan procedures *did* require prisoners to name potential defendants in their grievances, where these defendants are identified during the grievance process, there is no sensible rationale for a district court to reject a complaint on the ground that the identities of those defendants were omitted from the grievance itself. *Spruill v. Gillis*, 372 F.3d 218, 234 (3d Cir. 2004) ("the prison can excuse an inmate's failure to [name someone in his grievance] by identifying the unidentified persons and acknowledging that they were fairly within the compass of the prisoner's grievance").[9]

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[8] For cases in which the court concluded that policy makers did not have to be named in the grievance, see *Brown v. Sikes*, 212 F.3d 1205, 1209 (11th Cir. 2000); *Hooks*, 2006 WL 565909, *6; *Harris v. Moore*, No. 2:04CV00073 AGF, 2005 WL 1876126, at *2 (E.D. Mo. Aug. 8, 2005); *Freeman*, 2004 WL 1774737, at *3.

[9] The court of appeals faulted Walton for failing to file a new grievance once he learned that other prison officials were involved. J.A., Vol. I, at 173. However, the court failed to point to any provision in the Michigan grievance procedures that would have directed Walton to take this

For obvious reasons, prison officials do not decide grievances based solely on the prisoner's characterization of who is responsible for the problem. Grievance policies overwhelmingly provide for investigation of prisoners' complaints.[10] In fact, the Virginia policy that *amici* reviewed states that the Level I Warden or Superintendant *response* should include "the facts (who, what, when, where, why)," emphasizing the role of corrections officials in factual investigations.[11] In responding to one grievance, the highest reviewing authority for the New York Department of Correctional Services stated that "the names of staff are *irrelevant*. Staff were easily identifiable at the time of incident." State of New York Department of Correctional Services, Inmate Grievance Program Central Office Review Committee, Grievance No. SHG-21161-04 (January 19, 2005) (emphasis added) ("New York Sample Grievance 2"), *available at* http://www.law.yale.edu/academics/williamswaltonjones.asp. The nearly universal provision for investigation reflects the reality that it is generally much easier for prison authorities to investigate than prisoners, as well as more appropriate for security reasons. *See Brown v. Sikes*, 212

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course of action. In fact, it is quite possible that a new grievance raising the same issue would have been rejected as duplicative, Michigan Dept of Corrections Policy Directive 03.02.130, at G.1 (Nov. 1, 2000), or untimely, *id.* at G.3. In any event, filing an entirely new grievance simply to name a new individual who had already been identified by the prison would be completely wasteful, accomplishing nothing but to slow down the process and create more paper. *Hooks*, 2006 WL 565909, at *5 ("requiring an inmate to file additional grievances concerning essentially the same facts whenever he discovers additional information would harm the efficiency and the finality of the grievance process").

[10] *See, e.g.*, Federal Bureau of Prisons Program Statement 1330.13(5)(a)(3) (Aug. 6, 2002); Rules of the Fla. Dep't of Corr. 33-103.006(6) (Feb. 9, 2005); Wis. Admin. Code DOC § 310.11 (Oct. 2005).

[11] Virginia Dep't of Corr., Procedure No. DOP 866, § 866-7.15(1) (November 20, 1998).

F.3d 1205, 1209 (11th Cir. 2000).[12] Further, a "name all potential defendants" rule could have significant adverse consequences for prison grievance systems. Encouraging prisoners to list on their grievances every corrections official and staff member whom they *might* ultimately wish to sue would result in grievances that were more complex and difficult to understand, reducing the efficiency of the system, and also reducing the actual notice function of the grievance system by burying the key information in a mass of speculative allegations included only from a perceived need to protect litigation options.

Worse, requiring prisoners to name names in all cases will serve to make grievance systems more adversarial. Many grievance policies expressly state that their purpose is to resolve problems, foster communication between prisoners and staff and reduce prisoner tension.[13] But a "name all defendants" rule threatens to turn a problem-solving process into a blame-fixing process, which

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[12] In the context of Title VII, which *does* require plaintiffs to name all potential defendants in the EEOC charge, courts similarly allow plaintiffs to sue defendants not named in the charge so long as they were identified during the EEOC investigation. *Terrell v. U.S. Pipe & Foundry Co.*, 644 F.2d 1112, 1123 (5th Cir. 1981), *vacated on other grounds*, 456 U.S. 955 (1982); *see also Long v. State of Florida*, 805 F.2d 1542, 1547 (11th Cir. 1986); *Givan v. Greyhound Lines, Inc.*, 616 F. Supp. 1223, 1227 (S.D. Ohio 1985).

[13] *See, e.g.*, Federal Bureau of Prisons Program Statement 1330.13, 11.b.3 (Aug. 6, 2002) (stating that purpose of grievance system is to "solve problems"); Ark. Dep't of Corr. Admin. Dir. 04-01 (III.F) (Feb. 1, 2004) (referring to grievance examiners as "problem-solv[ers]"); Del. Bureau of Prisons Procedure No. 4.4 (II) (May 15, 1998); Haw. Dep't of Public Safety Policy No. 493.12.03 (1.0) (April 3, 1992); Texas Dep't of Criminal Justice Offender Grievance Program pamphlet, *available at* www.tdcj.state.tx.us/publications/admin-rvw/publications-admin-rvw-offender-grievance.htm. Prison authorities affirmatively deny that the grievance system is adversarial in nature. *See, e.g.*, N.Y. Response from Central Office Review Committee to Grievance EL-26035-04 ("New York Sample Grievance 1") ("the grievance program is not intended to support an adversary process").

will likely encourage hostility between prisoners and staff and reduce the likelihood of fair consideration of prisoners' complaints. *Cf. Cleavinger v. Saxner*, 474 U.S. 193, 204 (1985) (noting that prison disciplinary hearing officers "are under obvious pressure to resolve a disciplinary dispute in favor of the institution and their fellow employee").[14]

The needlessness of requiring prisoners to name potential defendants in grievances is shown especially when, as in the present cases, prison authorities accept the grievance and resolve it on the merits. If it is the judgment of prison officials that the grievance provided sufficient notice, "the federal judiciary will not second-guess that action, for the grievance has served its function of alerting the state and inviting corrective action." *Riccardo v. Rausch*, 375 F.3d 521, 524 (7th Cir. 2004). *See also Spruill*, 372 F.3d at 234; *Ross*, 365 F.3d at 1186. Neither Williams' nor Walton's grievance was rejected at any level for failing to provide adequate notice or identify the individuals involved in the complaint.[15] Both were denied on the merits. Thus, any argument that Petitioners' claims should be rejected because they were not specific enough has been waived.

iii. Prison grievance systems are informal problem-solving systems and are not designed to serve as complete rehearsals for litigation.

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[14] As experts on prison management have recognized, "[O]ne of the relevant gauges of the effectiveness of a grievance system is the extent to which the participants in the system regard and treat it as 'adversarial.' . . . [T]he more 'adversarial' the system is or is perceived to be, the less likely it is to be or to be perceived as effective." Vincent M. Nathan, Evaluation of the Inmate Grievance System, Ohio Department of Rehabilitation and Correction (Feb. 13, 2001), *available at* http://www.law.yale.edu/academics/williamswaltonjones.asp.

[15] The rule requiring prisoners to name all potential defendants in their grievances is not at issue in Jones' case.

The Sixth Circuit's requirement that prisoners name all potential defendants in the first step of the grievance process incorrectly assumes that the grievance process is akin to litigation and accordingly should be subjected to all of its formal requirements. *E.g.*, *Curry*, 249 F.3d at 505 (faulting prisoner for failing to recognize that claim against different defendant was based on separate legal theory).[16] Prison grievance procedures uniformly omit requirements to include legal theories in the grievance, and those reviewing the grievance are unlikely to be trained to assess legal issues anyway.[17] Most procedurals are informal and include few of the protections found in litigation. *Cf. Cleavinger*, 474 U.S. at 206 (noting that prison hearings often lack "procedural safeguards" of more formal proceedings). They also lack most other features normally associated with litigation, such as discovery, a hearing and presentation of

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[16] Even if it were appropriate to impose litigation-style requirements on grievances, the Sixth Circuit's rules go beyond even those. Although plaintiffs are generally required to name defendants in their complaints, "when the substance of a *pro se* civil rights complaint indicates the existence of claims against individual officials not specifically named in the caption of the complaint, the district court must provide the plaintiff with an opportunity to amend the complaint" and assist the plaintiff in identifying the proper parties if necessary. *Donald v. Cook County Sheriff's Dep't*, 95 F.3d 548, 555 n.3 (7th Cir. 1996) (citing cases from Fourth, Fifth, Sixth, Seventh, Eighth and Eleventh Circuits); *see also Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 390 n.2 (1971) (noting district court's order to have complaint served upon agents described in complaint because plaintiff failed to name them). Even more generally, under Fed. R. Civ. P. 15, defendants may be added and dismissed from a complaint as discovery reveals more about the facts of the case.

[17] Commonwealth of Massachusetts, Governor's Commission on Corrections Reform, *Strengthening Public Safety, Increasing Accountability, and Instituting Fiscal Responsibility in the Department of Correction*, at 58 (June 30, 2004), *available at* http://www.mass.gov/Eeops/docs/eops/GovCommission Corrections R eform.pdf at 58 ("grievance coordinators have little or no training in due process, mediation or conflict resolution") [hereinafter Massachusetts Report].

evidence. In some cases, there is not even a guarantee that the grievance will be reviewed by someone other than the person about whom the prisoner is complaining.[18]

In the context of administrative law, content requirements for exhaustion in part "depen[d] on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding." *Sims v. Apfel*, 530 U.S. 103, 109 (2000) (plurality). Other courts have recognized that where a proceeding is non-adversarial, the decision maker has an obligation to flesh out the facts. *Shaw v. Chater*, 221 F.3d 126, 134 (2d Cir. 2000) (stating that ALJ must "affirmatively develop the record in light of the essentially non-adversarial nature of" proceeding) (internal quotations and brackets omitted).

b. Pleading with particularity and total exhaustion

Making prisoners plead exhaustion with particularity in court does not enhance the prison grievance process, which is over by the time suit is filed. Rather, the sole justification for this rule has been as a judicial management tool.

In *Jones Bey*, the court stated, "In the PLRA context, a total exhaustion rule would encourage prisoners to make full use of inmate grievance procedures and thus give prison officials the opportunity to resolve prisoner complaints." 407 F.3d at 807 (*quoting Ross*, 365 F.3d at 1190); *see also id.* at 808 ("[S]tate prison systems have a[n] . . . interest in resolving cases involving their own institutions.") The Sixth Circuit has conflated the rationales of exhaustion

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[18] *See* Massachusetts Report at 58 ("grievance coordinators regularly investigate complaints against their peers, superiors and themselves"); Cal. Code of Regs., tit. 15, §3084.5(e)(1) (December 31, 2004) ("institution heads and regional parole administrators" may "reevaluat[e] their own decisions" and "shall respond to appeals filed against them personally").

generally and a total exhaustion rule. The question is not whether prisons have an interest in resolving problems on their own—no one disputes this—but whether a total exhaustion rule furthers this interest in any significant way. Whatever interest the prison has in encouraging prisoners to use the grievance process is already protected by a rule requiring courts to dismiss those claims that the prison was not given the opportunity to review.

2. Reducing the quantity and improving the quality of prisoner lawsuits

None of the Sixth Circuit's rules is targeted at frivolous litigation and *amici* are aware of no court that has argued seriously to the contrary. Rather, each of them is more likely to present a "trap [for] the unwary *pro se* prisoner," *Slack v. McDaniel*, 529 U.S. 473, 487 (2000) (internal quotations omitted), without regard to potential merit.

Although some courts have suggested that the total exhaustion requirement deters frivolous suits and improves the quality of litigation by creating an administrative record, none has actually explained how the requirement furthers these goals. *See, e.g., Jones Bey*, 407 F.3d at 807; *Smeltzer v. Hook*, 235 F. Supp. 2d 736, 744-45 (W.D. Mich. 2002). Even if one assumes that exhaustion documents do provide helpful information generally, or that exhaustion helps to weed out claims without merit, these interests are already served if courts consider only claims that have been fully exhausted and have generated whatever records the grievance process provides.[19]

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[19] As a more general matter, the Court should be wary of any unsupported claims that documents generated during the grievance process provide any significant benefit during litigation. *See Jones Bey*, 407 F.3d at 813 (Clay, J., concurring in part and dissenting in part). Even a cursory glance at the grievance records and forms collected by *amici* demonstrates that there is little in them that would aid a court.

The Court in *Woodford* expressed concern that prisoners, especially those with frivolous or bad faith claims, may try to deliberately flout procedural requirements, perhaps so that they can avoid substantive review of their grievance and conceal its deficiencies. *Woodford*, 126 S.Ct. at 2385 & n.1. This concern, however, has no application to any of the three rules at issue in this case. Regardless whether a prisoner is required to name defendants in his grievances, plead exhaustion with specificity or be subject to a total exhaustion rule, he will still have to fully exhaust each of his claims before a court will consider them on the merits.

a. Naming all defendants

There is no benefit for prisoners to gain in purposely omitting information about staff who might later be subjects of a lawsuit. In fact, a prisoner who is acting simply out of malice against a particular officer, *see Woodford*, 126 S.Ct at 2385 n.1, is *more* likely to specifically identify that officer, if only to request that he or she be disciplined. In contrast, a prisoner with a legitimate concern that he simply wants resolved will be more likely to complain about the problem itself rather than apportion blame to staff members.

Even if a prisoner were purposely trying to suppress the identity of an officer he intended to sue later, this would

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The average grievance "record" consists of no more than a few pages, and responses to even very serious grievances may be no more than a few words. *See, e.g.*, Connecticut Grievance No. M1410378 ("Connecticut Sample Grievance 3") (prisoner complained that he had not received adequate mental health treatment; one sentence Level 2 response states: "Adequate mental health care is provided to all inmates at NCI."); Texas Grievance No. 200113072 (prisoner complained that he was being continually sexual assaulted by other prisoners; responses at Level 1 and Level 2 were each 2 sentences, stating that prisoner had "insufficient evidence"). For several other sample grievances and responses, *see* http://www.law.yale.edu/academics/williamswaltonjones.asp.

get him nowhere. If he provided enough information in his grievance to identify the problem, investigation conducted by the prison administration would reveal who was involved. *See supra* at 12-13. If he failed to provide sufficient notice of the problem, the grievance would either be rejected by the prison authorities or else later by the court, because all courts at a minimum require prisoners to provide fair notice of the problem before presenting the claim in court.

b. Total exhaustion

The magistrate judge in *Walton* stated that without a total exhaustion requirement, "there would be nothing to deter prisoners from raising unexhausted claims indiscriminately." J.A., Vol. I, at 161-62, (quoting *Smeltzer*, 235 F. Supp. 2d at 745). This statement is simply incorrect. Prisoners have full incentive to exhaust all claims, even without a total exhaustion rule, because in either case a prisoner will be barred from having his unexhausted claims heard on the merits. Prisoners gain nothing by filing unexhausted claims that will inevitably be dismissed.

Further, any disincentive created by a total exhaustion requirement is theoretical. As will be discussed further *infra* at 26-28, the logic adopted by the magistrate judge assumes that a *pro se* prisoner will generally have the *ability* to determine on his own which claims are exhausted and which are not when he is considering whether to include a particular claim in his lawsuit. Such an assumption is highly implausible when one considers that even trained lawyers are often stymied by the enormous body of case law that has developed around the question of what does and does not constitute adequate exhaustion. *See Blackmon v. Crawford*, 305 F. Supp. 2d 1174, 1180 (D. Nev. 2004) ("such incentives will have little effect because many prisoners do not understand the exhaustion rule in the first place.").

c. Pleading with particularity

The Sixth Circuit has suggested that putting the burden on prisoners and requiring them to plead exhaustion with specificity will prevent them from manipulating liberal pleading standards to avoid early dismissal of their unexhausted claims. *Baxter*, 305 F.3d at 490 ("Courts would be unable to screen cases effectively if plaintiffs were able, through ambiguous pleading, to avoid dismissal of claims on which relief could not be granted."); *see also Knuckles El*, 215 F.3d at 642 (stating that pleading requirement is necessary so that district courts do "not have to hold time-consuming evidentiary hearings" on exhaustion).

There are several responses to this. First, the majority of circuits have not adopted the Sixth Circuit's pleading requirements and there is no indication that they are unable to screen cases effectively.

Second, if the justification for imposing heightened pleading requirements is simply that it makes screening easier for courts, then there is no principled reason for limiting these requirements to exhaustion. Of course, courts in the Sixth Circuit screen prisoner complaints not just for evaluating compliance with the exhaustion requirement, but also to determine whether they have stated a violation of federal law. Under the Sixth Circuit's logic, prisoners should have the burden to anticipate all possible affirmative defenses in their complaint and be required to plead *all* allegations with particularity, so as to better enable district courts to weed out meritless claims. However, no court has suggested that the PLRA imposes such a burden.

Third, courts have no authority to impose heightened pleading standards simply because they believe it will help to weed out frivolous claims, *Swierkiewicz*, 534 U.S. at 514-15, even in the context of prisoner litigation. *Crawford El v. Britton*, 523 U.S. 574, 585 (1998). In *Crawford El*, the

Court acknowledged arguments in favor of heightened pleading and proof requirements where public officials' intent was at issue. Nevertheless, the Court concluded that it "would stray far from the traditional limits on judicial authority" to change standards of pleading and proof on the basis of courts' policy concerns alone. *Id.* at 594. Instead, "the authority to propose those far-reaching solutions lies with the Legislative Branch, not with" the Court. *Id.* at 601 (Kennedy, J., concurring).

It might cynically be argued that one of Congress' purposes was to reduce the amount of prison litigation generally, without regard to whether or not claims have merit. Such a claim is belied by the PLRA's legislative history,[20] and is inconsistent with the holdings of this Court. *Woodford*, 126 S.Ct. at 2388 (recognizing that PLRA reduces non-frivolous prisoner filings only "because some prisoners are successful in the administrative process, and others are persuaded by the proceedings not to file an action in federal court"). Further, as argued in Part III, if the PLRA were simply an expression of ill-will against prisoners or an attempt to deny prisoners' right to access the courts, it would not survive even the least demanding constitutional scrutiny. *See id.* at 2404 (Stevens, J., dissenting); *Romer v. Evans*, 517 U.S. 620, 634 (1996); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 874 (1992) (joint opinion) (stating that purpose of law is valid only if it is "one not designed to strike at the [constitutional] right itself"). Yet the devastating effects of the Sixth Circuit rules on prisoner

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[20] For example, Representative Canady stated: "These reasonable requirements will not impede meritorious claims by inmates but will greatly discourage claims that are without merit." 141 Cong. Rec. H1472, *1480 (discussing exhaustion, screening, and filing fee provisions of PLRA). Senator Hatch stated: "Indeed, I do not want to prevent inmates from raising legitimate claims." 141 Cong. Rec. S14611, *14626 (introducing an amendment "virtually identical" to the PLRA).

claims, completely unrelated to any assessment of their merits, *see infra* at 35-37, are indistinguishable from those of a statute purposefully crafted to keep a disfavored group's meritorious claims of violation of Federal rights out of court. Such rules cannot be tolerated in our constitutional order and should be overturned.

II. THE SIXTH CIRCUIT'S RULES HAVE CLOSED THE COURTHOUSE DOORS FOR PRISONERS

Each of the Sixth Circuit's three rules guarantees that many prisoners will never receive a ruling on the merits of their claims. When these rules are combined, the effect is devastating, leading to dismissal of nearly all prisoner complaints at screening.

A. The Sixth Circuit's "Pleading with Particularity" Requirement Is Unjustifiably Burdensome and for Many Prisoners an Insurmountable Obstacle

The Sixth Circuit's rule assessing exhaustion solely on the basis of the complaint is unrealistic and unfair, leading to many dismissals of potentially meritorious claims, as in the present cases. In *Jones*, for example, where the plaintiff alleged that he was assigned work that aggravated his medical condition, he made a good faith attempt to demonstrate in his complaint that he had exhausted his administrative remedies by alleging he had filed Step I, II and III grievances with respect to "each instant in which Plaintiff is alleging in this Complaint." J.A., Vol. I, at 8-9. He later provided his grievances to the court and the defendants conceded that that he had exhausted some of his claims. J.A. Vol. I, at 28-29. Nevertheless, both the district court and the court of appeals concluded that it was irrelevant whether the plaintiff actually had exhausted; all that mattered under *Knuckles El*

and *Baxter* was that he had failed to sufficiently allege it in his initial complaint, which, under Sixth Circuit rules, he was forbidden to amend to cure the defect. This reasoning is so remote from the language and purpose of § 1997e(a) as to lack any rational basis.

The Sixth Circuit rule is unfair not only because it fails to respect the leniency prescribed by this Court for *pro se* litigants, *see Haines v. Kerner*, 404 U.S. 519, 520-21 (1972), but also because it imposes a pleading requirement much more demanding than is imposed on any other category of litigant. Indeed, the Sixth Circuit's requirements are so far out of line with what is required by ordinary pleading rules that even prisoners who diligently study the Rules will not know that they were required to satisfy the particularity requirement until their complaint has already been dismissed.

Even for prisoners who know the Sixth Circuit rules, it is often not as easy as it might appear to comply with this requirement. The slightest misstep can lead to dismissal. *See Rand v. Antonini*, No. Civ.A 05-CV-70969, 2005 WL 3163390 (E.D. Mich. Nov. 28, 2005) (dismissing entire action because plaintiff had failed to attach one Step I response to his complaint, even though he attached appeal responses and defendants admitted he had "grieved through Step III"). Further, courts imposing this rule have assumed without explanation that prisoners will have better access to exhaustion records than prison officials. *Steele*, 355 F.3d at 1210. But this assumption is unjustified. Some facilities do not provide prisoners with copies of their grievances, *see* Letter from Wyoming Assistant Attorney General to ACLU of Wyoming (Jan. 26, 2006) ("AG Letter"), *available at* http://www.law.yale.edu/academics/williamswaltonjones.asp, while prison officials generally maintain these records in their own files. Even if a prisoner is provided with a copy initially, this does not mean that she will get to keep it. By the time the prisoners are ready to file complaints, they may have lost possession of the grievances as a result of

limitations on property, a unit transfer or a cell search during which grievances may have been confiscated or destroyed.[21] The Sixth Circuit's pleading and documentation rule encourages policies and practices that make it difficult for prisoners to retain their grievances.

Finally, in many cases, the question whether exhaustion is complete or even required is not one that can be resolved easily on the basis of the complaint alone—especially a *pro se* complaint that the court will not allow to be amended. As Justice Breyer recognized in *Woodford*, 126 S.Ct. at 2393, there are many circumstances where a prisoner does not complete all the steps of a grievance process but courts nevertheless find that she had exhausted all available remedies. Thus, whether a prisoner adequately exhausted will be contingent on the particular facts of each case, which may be quite complicated. Prisoners will often have neither the knowledge nor the ability to adequately explain details in a complaint with sufficient particularity to show definitively that the circumstances in their case justify an exception to the rule. *See Bauer v. Dunn*, No. Civ.A.1:05-CV-P22-R, 2005 WL 2077339 (W.D. Ky. Aug. 29, 2005) (dismissing for non-exhaustion complaint by prisoner alleging sexual assault even though documents attached to complaint suggested that she may not have grieved out of legitimate fear for her safety). Because of these complexities, it is generally more appropriate to decide the issue of exhaustion after the facts have been more fully

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[21] Case law and *amici*'s own experience demonstrate that one of the most common complaints among prisoners is that officers confiscated necessary legal materials during a cell search, including grievances needed to show exhaustion. *See, e.g., Jacobs v. Beard*, 172 F. App'x 452, 455 (3d Cir. 2006); *Caico v. McTernan*, 156 F. App'x 990, 990 (9th Cir. 2005); *Chappell v. McCargar*, 152 F. App'x 571, 572 (9th Cir. 2005); *Walker v. Page*, 66 F. App'x 52, 53-54 (7th Cir. 2003); *Hunter v. Welborn*, 52 F. App'x 277, 278 (7th Cir. 2002); *Bell v. Johnson*, 308 F.3d 594, 597-98 (6th Cir. 2002); *Walker v. Bain*, 257 F.3d 660, 663-64 (6th Cir. 2001); *Penrod v. Zavaras*, 94 F.3d 1399, 1404 (10th Cir. 1996).

developed. *See Ortiz*, 380 F.3d at 659; *Steele*, 355 F.3d at 1211. *Cf. Jacobs v. City of Chicago*, 215 F.3d 758, 775 (7th Cir. 2000) (Easterbrook, J., concurring) ("Rule 12(b)(6) is a mismatch for immunity and almost always a bad ground for dismissal . . . and when defendants do assert immunity it is essential to consider facts in addition to those in the complaint.")

The unfairness of the Sixth Circuit's pleading rule is compounded by its "no amendment" rule, which is to *amici*'s knowledge unique in denying any litigant, much less litigants who are almost all *pro se*, the benefits of Rule 15(a)'s policy of liberal amendment. Every other court to consider the question has rejected that view.[22]

B. A Total Exhaustion Rule Imposes an Unduly Harsh Penalty for Prisoners' Ignorance of Complex Legal Issues

It is the total exhaustion rule that has had the most pernicious effect on prisoners' ability to seek relief in federal court, for it means that one small mistake can cost a prisoner his entire lawsuit. For example, in *Edmonds v. Payne*, No. 3:04 CV P589 C, 2005 WL 2287006, *4 (W.D. Ky. Sep. 16, 2005), a prisoner sued several correctional officials, mostly for claims relating to failure to treat his Hepatitis C. The court found that the "plaintiff ha[d] availed

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[22] *See Brown v. Johnson*, 387 F.3d 1344, 1348-49 (11th Cir. 2004); *Grayson v. Mayview State Hosp.*, 293 F.3d 103, 109-14 (3d Cir. 2002); *Shane v. Fauver*, 213 F.3d 113, 117 (3d Cir. 2000); *Gomez v. USAA Fed. Sav. Bank*, 171 F.3d 794, 795-96 (2d Cir. 1999). These cases do not directly address exhaustion; they address the ability of plaintiffs to amend their complaints when they are found deficient at initial screening. The Sixth Circuit's contrary holding about the screening process is the basis for its "no amendment" policy concerning exhaustion defects as well as other deficiencies in prisoner complaints. *See McGore*, 114 F.3d at 612, *cited in Baxter*, 305 F.3d at 488-89.

himself of the grievance process on many of his claims," but noted that he had failed to specifically grieve one of the defendants' alleged interference with his treatment. *Id.* at *5. Although the plaintiff explained that he was unable to grieve this claim because he was transferred to another facility, the court faulted him for failing to grieve once he returned to the previous facility, even if the grievance would have been untimely at that point. *Id.* Thus, Edmonds was denied a decision on the merits for his entire case because he failed to realize that a court would expect him to file a grievance that would most likely be rejected as untimely.

1. Prisoners cannot reliably predict whether courts will find their claims to be exhausted.

As noted *supra* at 19, the total exhaustion rule is claimed to deter prisoners from including unexhausted claims in their lawsuits. But as the above example shows, this logic assumes incorrectly that even the most conscientious prisoner can reliably determine in advance which of his claims a court will find to be exhausted.

Since its enactment, the PLRA has generated vast amounts of case law, particularly regarding the exhaustion requirement, much of it contradictory, ambiguous or turning on idiosyncratic factual distinctions. *See* John Boston, The Prison Litigation Reform Act, 15-137 (Feb. 27, 2006), *available at* http://www.law.yale.edu/academics/williamswaltonjones.asp. "Indeed, the law on the narrow subject of the PLRA's exhaustion requirements continues to evolve month by month." *McCoy v. Goord*, 255 F. Supp. 2d 233, 240 (S.D.N.Y. 2003) (footnotes, quotations and brackets omitted), *cited in Steele*, 355 F.3d at 1207 n.1.

A Sixth Circuit prisoner considering litigation may face numerous questions that he must answer without the assistance of counsel, on penalty of dismissal for the

slightest mistake. For example, will he satisfy § 1997e(a) if he:

(a) filed suit after failing to receive a response to one of his grievances because the grievance procedures did not inform him what to do in such a case?[23]

(b) reasonably believed that the grievance policy did not allow or require the issue to be exhausted?[24]

(c) failed to complete the grievance process but circumstances justifying estoppel against the defendants are present?[25]

(d) did not appeal the grievance because it was resolved completely in his favor[26] or he was promised some relief, but not necessarily everything that the prison could have provided?[27]

(e) completed the exhaustion process for one grievance arising out of an ongoing problem (such as medical treatment for a particular condition or repeated sexual assaults), but he did not file new grievances after new but related instances occurred?[28]

(f) had complained about the same conduct in a disciplinary appeal but did not file a separate grievance on the issue?[29]

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[23] *Compare Dole v. Chandler*, 438 F.3d 804, 809-10 (7th Cir. 2006) (yes); *with Daily v. First Correctional Medical*, No. Civ.A. 03-923-JJF, 2006 WL 1517767, at *2 (D. Del. May 30, 2006) (no).

[24] *Compare Giano v. Goord*, 380 F.3d 670, 678 (2d Cir. 2004) (yes), *with Steele*, 355 F.3d at 1214 (no).

[25] *Compare Hemphill v. New York*, 380 F.3d 680, 686 (2d Cir. 2004) (yes), *with Rutherford v. Cabiling*, No. Civ. 00-CV-2444REBPAC, 2005 WL 2240355, at *3 (D. Colo. Sept. 14, 2005) (no).

[26] *Compare Brown v. Valoff*, 422 F.3d 926, 935 (9th Cir. 2005) (yes), *with Williamson v. Wexford Health Sources, Inc.*, 131 F. App'x. 888, 890 (3d Cir. 2005) (no).

[27] *Compare Thornton v. Snyder*, 428 F.3d 690, 696-97 (7th Cir. 2005) (yes), *with Braham v. Clancy*, 425 F.3d 177, 182-83 (2d Cir. 2005) (no).

[28] *Compare Johnson*, 385 F.3d at 521 (yes), *with Kane v. Winn*, 319 F. Supp. 2d 162, 223 (D. Mass. 2004) (no).

[29] *Compare Mitchell v. Horn*, 318 F.3d 523, 531 (3d Cir. 2003) (yes), *with Hattie v. Hallock*, 8 F. Supp. 2d 685, 689 (N.D. Ohio 1998) (no).

(g) did not comply with all technical requirements of the grievance system but complied substantially or made reasonable efforts to comply?[30]
(h) failed to exhaust because his ability to do so was impaired by mental illness, illiteracy, age or disability?[31]
(i) failed to file a grievance because he was threatened with retaliation?[32]
(j) failed to file a grievance or appeal based on information he relied on from prison officials?[33]

Even the courts do not agree on these matters, a decade after the statute's enactment. If questions regarding exhaustion are even "challenging for the courts to decide," *Ortiz*, 380 F.3d at 659, how can *pro se* prisoners reasonably be expected to predict how a particular judge might rule?

Thus, if a total exhaustion rule has any effect on prisoners' filing behavior, it will not be to deter filing claims they know are unexhausted. Rather, more likely it will chill prisoners from filing claims that are arguably but not clearly exhausted. Similarly, it will provide an enormous incentive to prison authorities to make the exhaustion process as confusing and difficult as possible, because they will know that any slight misstep could lead to dismissal of all a prisoner's potential claims.

2. Other harsh consequences of the total exhaustion rule

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[30] *Compare Nyhuis v. Reno*, 204 F.3d 65, 77-78 (3d Cir. 2000) (yes), *with Days v. Johnson*, 322 F.3d 863, 866 (5th Cir. 2003) (no).

[31] *Compare Gonzalez v. Lantz*, No. 303CV2264SRUWIG, 2005 WL 1711968, at *3 (D. Conn. July 20, 2005) (yes), *with Williams v. Kennedy*, No. C.A. C-05-411, 2006 WL 18314, at *2 (S.D. Tex. Jan. 4, 2006) (no).

[32] *Compare Osborne v. Coleman*, No. 2:00CV801, 2002 WL 32818913, at *4 (E.D. Va. Sept. 9, 2002) (yes), *with Broom v. Engler*, No. 4:05-CV-123, 2005 WL 3454657, at *3 (W.D. Mich. Dec 16, 2005) (no).

[33] *Willis v. Smith*, No. C04-4012-MWB, 2005 WL 550528 at *13 (N.D. Iowa Feb. 28, 2005) (yes), *Mendez v. Herring*, No. 05-1690 PHX/JAT, 2005 WL 3273555, at *2 (D. Ariz. Nov. 29, 2005) (no).

The Sixth Circuit's total exhaustion rule undermines this Court's command to construe complaints liberally, which requires district courts to determine whether any facts alleged in a complaint state a claim under any legal theory. *See Conley*, 355 U.S. at 45-46; 5B Charles Alan Wright & Arthur Miller, *Federal Practice and Procedure*, § 1357, at 676 (3d ed. 2004). Of course, the intention of this rule is to better insure that complaints are not dismissed simply for technical deficiencies or a plaintiff's unfamiliarity with the law. The Sixth Circuit, however, has turned the rule on its head. For if a court construes a complaint liberally and mistakenly construes as a claim allegations that are present merely for background or context, it will inevitably lead to dismissal of the entire lawsuit for failure to adequately allege exhaustion—a prisoner will not allege he filed grievances for a "claim" he did not intend to assert.[34]

A prisoner affected by the total exhaustion rule will also have to pay an additional filing fee, which is currently $350, to pursue claims that were properly exhausted in the first place.[35] It scarcely needs to be noted that the vast majority of prisoners have great difficulty paying one filing fee, let alone multiple fees for each suit that is dismissed for a procedural error. If a prisoner tries to complete the grievance process for any unexhausted claim, she may be

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[34] Thus, in *Nwozuzu v. Rummels*, No. CIV S-05-1938 MCE DAD P, 2006 WL 1897120 (E.D. Cal. July 11, 2006), the plaintiff complained of numerous events and conditions, many of which he had not exhausted, but he explained in response to a motion to dismiss that they were not separate claims but constituted factual support for the claims that were exhausted. Under Sixth Circuit rules, he would not have had an opportunity to provide this explanation, and his complaint would likely have been dismissed with no opportunity to amend and clarify it.

[35] Even prisoners who are granted leave to proceed *in forma pauperis* must still pay the entire filing fee in increments. 28 U.S.C. § 1915(b).

unable to return to court until after the statute of limitations has expired.[36]

Of course, after *Woodford*, there will generally be little point for prisoners to attempt to complete the grievance process, since by then any new grievance will be untimely and the claims will be barred from federal court. Although prison authorities may consider an untimely grievance on the merits, common sense and *amici*'s own collective experience suggest that this is the rare exception rather than the rule. Prison officials often deny extensions even under very extenuating circumstances. *See, e.g., Days v. Johnson*, 322 F.3d 863, 865 (5th Cir. 2003) (describing prison officials' refusal to grant good cause extension where prisoner was unable to fill out grievance form because he broke his writing hand).[37]

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[36] Thus, in practice, the Sixth Circuit's total exhaustion rule is much harsher than the one this Court has applied in the context of habeas corpus. A number of courts have explained why habeas provides an inappropriate analogy for determining whether a total exhaustion rule should apply to civil rights claims. *See, e.g., Lira v. Herrera*, 427 F.3d 1164, 1174-75 (9th Cir. 2005); *Ortiz*, 380 F.3d at 660-62. Even if habeas did provide an appropriate model, however, there are a number of factors in the context of habeas cases that significantly soften the impact of a total exhaustion rule. Most importantly, habeas petitioners have the option of deleting any unexhausted claims from their petition in lieu of filing a new one. *Rose v. Lundy*, 455 U.S. 508, 520 (1982). As one court has recognized, there is little practical difference between rejecting a total exhaustion rule outright and allowing the plaintiff to file an amended complaint. *Beltran v. O'Mara*, 405 F. Supp. 2d 140, 158 (D.N.H. 2005). Additionally, district courts are now empowered, even required in some circumstances, to stay a partially exhausted case rather than dismiss it, and hold the case in abeyance while the prisoner finishes exhausting. *Rhines v. Weber*, 544 U.S. 269 (2005). The Sixth Circuit has not recognized either one of these alternatives to complete dismissal in cases challenging prison conditions. *Freeman v. Francis*, 196 F.3d 641 (6th Cir. 1999) (holding that prisoners "may not exhaust administrative remedies during the pendency of a federal suit").

[37] Moreover, when a prisoner is returning to the grievance process after his claim is dismissed under the total exhaustion rule, officials will have an additional incentive to reject the grievance as untimely, because they

C. Prisoners are unable to identify all potential defendants within the short grievance deadlines.

In many cases, prisoners simply cannot comply with a requirement to name all potential defendants in the initial grievance. Prisoners often do not know the identities or even titles of staff involved in an alleged deprivation. A prisoner could be personally mistreated by a staff member who was hiding his identity, or whom the prisoner had never seen before. *See, e.g., Stackhouse v. Maricopa County*, No. CV 05-0028-PHX-DGC(MEA), 2006 WL 2037939, at *2 (D. Ariz. July 19, 2006). More often, because prisoners are so limited in their freedom of movement and ability to obtain information, they may experience a deprivation without knowing its source. Importantly, grievance systems generally lack a mechanism for enabling prisoners to reliably to identify potential defendants, even if one wanted to do so. They do not contain provisions for discovery, and *amici* did not find any policies that permitted prisoners to "amend" a grievance so that they could add a name.[38] When prisoners attempt to identify the responsible person, they simply have to guess, as in Walton's case, where he was told by the grievance examiner that he was mistaken

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will know that the prisoner intends to take this claim to court and they now have the authority to prevent him from doing so. Reports to *amici* from prisoners in Illinois suggest that has become standard operating procedure since the Seventh Circuit decided *Riccardo*, 375 F.3d 521, in which the court held that prison officials waive the untimeliness of a grievance if they consider it on the merits. According to prisoners held in Illinois, since that decision, the department of corrections no longer makes exceptions for late grievances.

[38] Of course, prisoners in many states would likely be permitted to withdraw their grievance and file a new one with additional information. However, because grievance deadlines can be as short as a few days, a prisoner risks having the new grievance rejected as untimely.

about the identity of the person who made the decision about which he was complaining.[39]

A requirement that prisoners learn identities of unknown potential defendants is particularly unrealistic in view of the short deadlines of many grievance systems. After *Woodford*, prisoner plaintiffs in the Sixth Circuit face a classic Catch-22. On the one hand, they must file their grievance within the time prescribed or face procedural default. But they must also be able to identify every person whom they may want to sue later. Few prisoners will be able to do this in such a short time, so they will have to choose between losing the right to sue potential defendants and continuing to investigate while taking the chance that their grievance will be rejected as untimely.

Most *lawyers* could not, on a few days' or weeks' notice and without discovery, identify all the defendants who might eventually turn out to be liable for the harm caused to a plaintiff as the result of a constitutional violation. But of course, lawyers may add new defendants as discovery reveals new facts, even after the statute of limitations has run if the plaintiff can satisfy Fed. R. Civ. P. 15(c)(3). In contrast, in the Sixth Circuit, the universe of potential defendants is frozen the day a prisoner files a Step I grievance.

Second, and closely related, a prisoner may simply be unaware that a particular official had any involvement in a constitutional violation. This will often be the case when the violation is a result of a widespread policy or practice.

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[39] *See also Brown*, 212 F.3d at 1208 (concluding that PLRA did not require prisoner to "provide information he does not have and cannot reasonably obtain"); *Sulton v. Wright*, 265 F. Supp. 2d 292, 298 (S.D.N.Y. 2003) (noting *pro se* prisoners' difficulty in identifying defendants); *Lira v. Dir. of Corr. of State of California*, No. C00-905 SI (PR), 2002 WL 1034043, at *4 (N.D. Cal. May 17, 2002) ("[A]n inmate may not know all the names of the defendants until after he files a civil action and conducts discovery, in which case, he would have to dismiss his action and file anew under defendants' reasoning.").

In that circumstance, the prisoner may name the lower level official who was required to enforce the policy or practice, but he may have no basis for knowing who was ultimately responsible for the decision. The same is true when the misconduct of line staff has its roots in the defaults or tacit authorization of supervisors; a prisoner may not know the facts or appreciate the complexities of supervisory liability under 42 U.S.C § 1983 within the short time limit for filing a grievance. *Cf. Kozohorsky v. Harmon*, 332 F.3d 1141, 1143 (8th Cir. 2003) (holding that a prisoner who grieved about the officers who abused him, but did not raise in his grievance claims that their supervisor refused to take action against the officers, failed to train them and retaliated against him for his complaints, had not exhausted his claim against the supervisor).

The injustice of a rule that requires prisoners to name all potential defendants in their grievances is shown in *Broder v. Corr. Med. Servs., Inc.*, No. 03-CV-75106 (E.D. Mich. Sept. 22, 2004), in which the plaintiff filed a § 1983 action alleging that the defendants failed to timely diagnose and treat his throat cancer.[40] In his grievances, the plaintiff had identified at least 37 individual medical providers and officials, but when he filed his lawsuit, he also named the corporate entity responsible for providing medical care, Correctional Medical Services. Although there was no dispute that Broder had fully identified all of the problems he was experiencing in his grievances, the district court nevertheless dismissed CMS because it was not named separately in the grievances.[41]

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[40] This case is not available on Westlaw. However, *amici* have posted the decision at http://www.law.yale.edu/academics/williamswaltonjones.asp.

[41] *See also VanDiver v. Martin*, 304 F. Supp. 2d 934, 943-44 (E.D. Mich. 2004) (finding non-exhaustion on medical claims; although plaintiff had named individuals in complaint, court found that plaintiff had not sufficiently named corporate provider where his grievance said only that provider would be liable if his foot was amputated).

If this Court concludes that all defendants must be named in a grievance, it will severely impair prisoners' ability to pursue meritorious challenges to prison policies, since the decision makers are so often unseen by and unknown to affected prisoners. It is unrealistic to expect prisoners to be able to contemplate and investigate the decision-making hierarchy within a prison, much less figure it out, within the time prescribed by the rules, when they are simply trying to use the grievance system to get some relief. Also, prisoners cannot be expected to have mastered all the potential theories of personal involvement under § 1983 before filing their level one grievance. *See Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995) (discussing five theories of personal involvement under § 1983).

As noted *supra* at 8, there is clearly no basis to impose a "name all defendants" rule where the prison grievance system has addressed the merits of the complaint. There is particularly no basis for a court to impose such a requirement where the grievance system gave no notice to prisoners of any such requirement, as is the case here. *See Sims*, 530 U.S. at 113 (O'Connor, J., concurring in part and concurring in the judgment) (concluding that "agency's failure to notify claimants of an issue exhaustion requirement" was sufficient basis to reject such requirement). Further, if prison administrators accept the grievance and resolve it on the merits, the prisoner will have no way of knowing she did anything wrong until after her case is dismissed, when it is too late to cure the defect and most likely too late to file a new grievance. If the authorities believe they do not have enough information to adequately investigate the grievance, it is well within their authority to either ask the prisoner for more information or to explicitly reject the grievance and invite the prisoner to re-file. They should not be permitted to decide a grievance on the merits and then later assert in court that they actually needed more information. This would only invite prison officials to insert highly technical and confusing

requirements in their procedures to be invoked in case of litigation.

D. The Insidious Interaction of the Sixth Circuit's Rules

In his dissenting opinion in *Jones Bey*, 407 F.3d at 814, Judge Clay made a dire prediction: "In practice, the total exhaustion rule is not only likely to amount to a monetary penalty, it is also likely to be a convenient means for district courts to expediently close the courthouse door to *pro se* prisoner litigants, without proper regard for the merits of their claims or consideration of their status." Judge Clay's prediction has come true. The total exhaustion rule, in combination with the Sixth Circuit's requirements to plead exhaustion with specificity and name all potential defendants in the grievance, has all but eliminated prisoners' ability to obtain rulings on the merits of their claims.

Of the nearly 500 prisoner screening orders available on Westlaw from the Sixth Circuit since *Jones Bey* was decided, only eighteen allowed the prisoner to proceed.[42] Of these eighteen, eight involved cases in which *Jones Bey* required complete dismissal but the district court (Judge Richard Alan Enslen) refused to follow that case. In five more cases, the district court either ignored the total

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[42] *Amici* chose the date of the *Jones Bey* decision to begin tracking screening orders because, as of that date, all of the Sixth Circuit's rules at issue in this case were in effect. To generate this result, *amici* conducted the following Westlaw search on July 5, 2006, in the database FED6-ALL, which encompasses all district and appellate cases in the Sixth Circuit: PLRA "PRISON LITIGATION REFORM ACT" (28 /4 1915!) 1997E! & DA(AFTER 4/27/2005). (*Amici* included appellate cases for the purpose of evaluating whether any district court decisions were reversed on appeal.) *Amici* reviewed all results from this search, pulling from it all orders screening prisoner complaints under the PLRA. Excluded from the total were cases in which the court concluded that the prisoner had improperly filed the lawsuit under § 1983 instead of one of the habeas corpus statutes.

exhaustion rule or ignored the question of exhaustion altogether. Thus, in screening orders where the district court applied *Jones Bey*, *only five did not result in dismissal of the entire case*.[43] Of the cases dismissed, more than half were dismissed for the prisoner's failure to comply with one or more of the three rules at issue in this case. By comparison, in the Seventh Circuit, of 25 screening orders available on Westlaw for June 2006, 12 of them allowed the prisoner to proceed.

Thus, as Judge Clay feared, the courthouse door is now effectively closed for all but the savviest prisoners incarcerated in Ohio, Michigan, Tennessee and Kentucky. The Sixth Circuit has not adopted reasonable rules that improve the quality of litigation and help prison authorities solve problems. Instead it has imposed a series of "gotchas," to which nearly all prisoners have fallen victim. *Hooks*, 2006 WL 565909, at *5 ("The exhaustion requirement is a gatekeeper, not a 'gotcha' meant to trap unsophisticated prisoners who must navigate the administrative process *pro se*."). *See also Slack*, 529 U.S. at 487 (stating that exhaustion should not present a "trap" for "the unwary *pro se* prisoner").

This result should trouble anyone who believes that prisoners should retain an actual as opposed to theoretical ability to enforce their rights in federal court. It should also raise alarm for anyone who is concerned about prison

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[43] In three of those five cases, the court found that the plaintiff had not alleged completion of each step of the grievance process, but nevertheless allowed the case to proceed. *See Hahn v. Tarnow*, No. 5:06CV74, 2006 WL 1705128, at *2 n.4 (W.D. Mich. June 16, 2006) (finding that plaintiff failed to complete grievance process, but concluding that he had no available remedies because plaintiff alleged he was on "modified grievance access"); *Rayburn v. Sizemore*, No. Civ. A 605322DCR, 2005 WL 1593947 (E.D. Ky. July 6, 2005) (finding failure to exhaust but allowing case to proceed because complaint contained allegations suggesting estoppel); *Martin v. Sizemore*, No. Civ.A. 05-CV-1050KKC, 2005 WL 1491210 (E.D. Ky. June 22, 2005) (same).

security. It is hardly surprising that social scientists have found that a primary cause of violence is a feeling that peaceful methods of resolving disputes are not available. James Gilligan, *Violence* 112 (1996). If prisoners believe that they will not receive a hearing on their claims in court, this can increase a sense of injustice and frustration, creating a heightened risk for violent confrontations with both staff and other prisoners.

III. THE COURT MUST EVALUATE ANY EXHAUSTION REQUIREMENTS FOR CONSISTENCY WITH 42 U.S.C. § 1983 AND THE RIGHT OF ACCESS TO THE COURTS

A. The Court Must Interpret the PLRA So As Not to Conflict with § 1983 and the Right of Access to Courts

Although interests in reducing frivolous litigation and protecting agency autonomy are undoubtedly important, they are not the only interests to be considered in determining the validity of exhaustion requirements that are not found in the text of the PLRA itself.[44] The PLRA does not repeal 42 U.S.C. § 1983 as it applies to prisoners. As a result, where possible, the two statutes should be construed so as not to conflict. *Pittsburgh & Lake Erie R.R. Co. v. Ry. Labor Executives' Assoc.*, 491 U.S. 490, 510 (1989). Particularly where, as here, the PLRA is silent or at best ambiguous, courts must be mindful not to undermine the policies underlying § 1983 when considering burdens on prisoners' ability to bring and maintain lawsuits. *See*

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[44] Even in habeas cases, in which the exhaustion requirement implicates more strongly interests in comity and federalism, this Court has acknowledged that a prisoner's "interest in obtaining federal review of his claims" can outweigh "competing interests in finality and speedy resolution of federal petitions." *Rhines*, 544 U.S. at 278.

Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 685 (1978) (stating that Congress intended § 1983 to provide "broad remedy" for violations of federal rights); *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (stating that purpose of § 1983 was "to interpose the federal courts between the States and the people").

The Court must also consider the right of access to the courts. "[T]he right to file a court action might be said to be [a prisoner's] remaining most 'fundamental political right, because preservative of all rights.'" *McCarthy v. Madigan*, 503 U.S. 140, 153 (1992) (*quoting Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)). That right guarantees prisoners that they will not be arbitrarily prevented from litigating a federal action, *see Ex parte Hull*, 312 U.S. 546, 549 (1941), and, further, that they will have "a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." *Bounds v. Smith*, 430 U.S. 817, 825 (1977); *see also Lewis v. Casey*, 518 U.S. 343, 351 (1996). Courts have a duty to construe statutes narrowly so as to avoid potential conflicts with constitutional rights. *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001). The Court should interpret the PLRA in a manner that is consistent with prisoners' constitutional right to court access.

Finally, when evaluating burdens on prisoners' court access, courts must also consider prisoners' status. Many are uneducated, illiterate and indigent. *See* U.S. Department of Education Office of Education and Research, *Literacy Behind Prison Walls: Profiles of the Adult Prison Population from the National Adult Literacy Survey* (1994). All but a lucky few are *pro se*, particularly during the grievance process. This Court and others have acknowledged various ways in which courts should accommodate *pro se* parties.[45] At a minimum, this means

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[45] *See Hughes v. Rowe*, 449 U.S. 5, 9 (1980) (pleading); *Traguth v. Zuck*, 710 F.2d 90, 95 (2d Cir. 1983) (re-opening case after default); *Madyun*

that courts should not impose procedural rules that are harsher than those required in cases that are usually handled by counsel, such as refusal to allow amendment to cure deficiencies, a requirement to plead exhaustion with specificity and an expectation that the prisoner will have fully developed theories of liability by the level one grievance deadline.

These principles suggest a standard already noted in *Woodford*, 126 S.Ct at 2392: prisoners are entitled to a "meaningful opportunity" to "raise meritorious grievances" and present their claims to a federal court. As demonstrated *supra* at 35-37, the Sixth Circuit's rules deprive prisoners of this opportunity. They are essentially arbitrary barriers to prisoners' exercising their right to access the courts and cannot be allowed to stand.

B. The Right of Access to Courts and § 1983 Limit Prison Authorities' Discretion in Imposing Grievance Requirements

The right of access to the courts and the policies underlying § 1983 are also relevant in considering the validity of procedural requirements imposed by prison officials. To reject the Sixth Circuit's rules, the Court need only recognize the principle implicit in *Woodford*, that if a prisoner follows all of the prison's procedures, she cannot later be denied access to the courthouse for failure to exhaust. However, to the extent the Court believes that Petitioners somehow failed to comply with any grievance procedures, it is important that the Court recognize that prison officials may not impose requirements that are

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v. Thompson, 657 F.2d 868, 876 (7th Cir. 1981) (instructions on summary judgment); *Gordon v. Leeke*, 574 F.2d 1147, 1152-53 (4th Cir. 1978) (amending complaint). In other words, courts should take into account whether a particular requirement is one "which an uncounseled inmate can be fairly required to satisfy." *Hooks*, 2006 WL 565909, at *5.

inconsistent with the right of access to courts or the policy underlying § 1983. *Johnson*, 385 F.3d at 517 n.8 ("a state could not make grievance rules that prevented the vindication of substantive rights"); *Spruill*, 372 F.3d at 235 ("Such measures, we reiterate, must be consistent with the Federal Constitution and the federal policy embodied in § 1997e(a) to be enforced as grounds for procedural default in a subsequent federal lawsuit."); *Strong*, 297 F.3d at 649 ("[N]o prison system may establish a requirement inconsistent with the federal policy underlying § 1983 and § 1997e(a)."). Again, at a minimum this means that prisoners must have "a meaningful opportunity" to exhaust their administrative remedies. *Woodford*, 126 S.Ct. at 2392. *Cf. James v. Kentucky*, 466 U.S. 341, 348 (1984) (holding that state procedural rules will not be enforced in habeas corpus if they do not rest on adequate grounds).[46]

One of the purposes of § 1983 was to protect the people from potential "prejudice, passion, neglect, [and] intolerance" of state actors. *Monroe v. Pape*, 365 U.S. 167, 180 (1961). Undoubtedly, there is always potential for abuse when a party must first seek relief from the same entity that she may later sue in court. *See Felder v. Casey*, 487 U.S. 131, 142 (1988). In the prison context, a future plaintiff may be required to submit her grievance to the same *person* that she believes violated her constitutional rights. *See, e.g.*, Utah Grievance No. 990859363 ("Utah Sample Grievance 2") (prisoner complained that officer refused to move him away from cell mate before he was assaulted; same officer that refused to move him decided his grievance). Under these circumstances, it becomes critically important to guard the right of access to the courts and

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[46] In *Woodford*, 126 S.Ct. at 2386 (emphasis added), the Court suggested that it was appropriate to evaluate the necessity and importance of prison exhaustion requirements when it noted that compliance with "*critical* procedural rules" was needed to ensure that prison officials have an adequate opportunity to consider the grievance.

ensure that prison officials are not using their complete control to immunize themselves from scrutiny. *See Campbell v. Chaves*, 402 F. Supp. 2d 1101, 1106 n.3 (D. Ariz. 2005) (noting danger that grievance systems might become "a series of stalling tactics, and dead-ends without resolution").

It is far from speculative to believe that prison authorities may try to manipulate exhaustion requirements to deprive a prisoner of his right of access to courts. With respect to "name the defendant" requirements, at least one state has already amended its grievance procedures to require this, but only after the Seventh Circuit allowed a prisoner's lawsuit to go forward because the then-current version of the Illinois procedures were silent on this issue. *Compare* Ill. Adm. Code tit. 20 § 504.810(b) (2005) *with* Ill. Adm. Code tit. 20 § 504.810 (1998), *available at* http://www.law.yale.edu/academics/williamswaltonjones.asp.[47]

More generally, there are any number of policies that appear calculated to keep prisoners' claims, however, legitimate, out of court. For example, Mississippi's grievance system provides many illustrations of the ways in which prison authorities may set "traps" preventing prisoners from suing: (1) the handbook provided to Mississippi prisoners explaining the grievance process omits information about the requirement to appeal and the applicable appeal deadlines;[48] (2) prisoners face denial of

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[47] In *Strong*, 297 F.3d 646, the court held that the required level of specificity in a grievance was controlled by the facility's grievance procedures.

[48] *Compare* Mississippi Dep't of Corr., Standard Operating Procedure 20-08-01, at 3 (July 1, 2003) (setting forth appeal process and deadlines for appeal including five-day limit for appeals from the step one response), *with* Mississippi Dep't of Corr., Inmate Handbook, 54-59 (Dec. 8, 2005) (omitting this information). All grievance materials cited in notes 50-55 and 58-60 are available at http://www.law.yale.edu/academics/williamswaltonjones.asp.

their grievance if they fail to use the magic words, "this is a request for [an] administrative remedy" on their grievance;[49] (3) Mississippi prisoners who submit even serious grievances may have to wait *years* before they receive even a boilerplate response;[50] (4) no matter how long they have been waiting for a response, prisoners may not have a second grievance considered unless they *withdraw* the first grievance, allowing officials to coerce prisoners into abandoning claims by simply refusing to decide them;[51] (5) if a prisoner seeks assistance from a lawyer during the grievance process, officials may simply reject the grievance;[52] (6) finally, and most egregiously, when prisoners complete the grievance process they receive a "certificate" from the administrator, informing them that they must "seek judicial review within 30 days of receipt of the Third Step Response," a blatant misrepresentation of the law, which has no doubt resulted in many Mississippi prisoners being misled into abandoning their claims.[53]

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[49] Mississippi Dep't of Corr., Inmate Handbook, at 55-56 (Dec. 8, 2005).

[50] One prisoner filed a grievance complaining of excessive cold in November 2000; he did not receive a First Step Response until March 2003. *See* Mississippi Grievance No. MSP-03-474 ("Mississippi Sample Grievance 4"). Another grievance filed in November 2000 complained of inadequate medical care; the first step response came in May 2003. Mississippi Grievance No. MSP-03-1313 ("Mississippi Sample Grievance 2"). *See also* Mississippi Grievance MSP-04-163 ("Mississippi Sample Grievance 3") (in May 2003 prisoner filed grievance complaining that housing conditions threatened his health and safety; first step response came in February 2004, stating only, "Your charges are unfounded").

[51] Mississippi Dep't of Corr., Standard Operating Procedure 20-08-01, at 2 (July 1, 2003); Letter from Legal Claim Adjudicator (Sept. 9, 2003) ("Mississippi Sample Grievance 5").

[52] *See* Memo from Legal Claims Adjudicator (Mar. 31, 2003) ("Mississippi Sample Grievance 6"). (refusing to process grievance when prisoner requested that response be forwarded to lawyer even though grievance rules did not list this as basis for rejection).

[53] *See* Certificate for Mississippi Grievance No. MSP-04-163 ("Mississippi Sample Grievance 3").

Within the Sixth Circuit, an expert appointed by the Ohio Department of Rehabilitation and Correction concluded that the grievance system there was "unduly complicated," that the handbook provided to the prisoners was not helpful, that many prisoners did not understand how to grieve properly and that there was an "unacceptably high" level of staff retaliation against prisoners for using the grievance process.[54] In Michigan there is a restriction called "modified access," under which some prisoners are prohibited from filing grievances for at least 90 days unless they first obtain permission from prison officials, a policy bearing an eerie resemblance to the one this Court struck down in *Ex Parte Hull*, 312 U.S. 546 (1941). *See* Michigan Dep't of Corrections Policy Directive 03.02.130, JJ-NN (December 19, 2003).

Other prisons, too, have adopted confusing or overly cumbersome procedures,[55] severely restrict permission to

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[54] Vincent M. Nathan, Evaluation of the Inmate Grievance System, Ohio Department of Rehabilitation and Correction, at 24, 28 (Feb. 13, 2001), *available at* http://www.law.yale.edu/academics/williamswaltonjones.asp. For example, the report notes: "[A]n inmate who is attempting to understand the time frames within which the grievant and others must operate under the grievance system must consult two departmental policies and at least two administrative rules on the subject. Even then, he is left with significant unanswered questions on the issue of time limits." *Id.* at 15-16. Also, in 1999 the Missouri Department of Corrections found that the Ohio State Penitentiary Inmate Handbook, in its section titled "Grievance Procedures," did not advise the prisoner that there is a time limit for filing grievances or that there was an appeal process. *See Brief for the ACLU as Amicus Curiae Supporting Respondent*, at 19, in *Booth v. Churner*, 532 U.S. 731 (2001), *available at* 2000 WL 1868111.

[55] *See* Massachusetts Report at 58 (concluding that procedures are "vague, ambiguous and discretionary"); *Brief for the ACLU as Amicus Curiae* in *Booth* at 19 (citing 1999 survey from Missouri Department of Corrections, which found that Washington state procedure was "very lengthy and very detailed. Certain issues are not always in one area in

file grievances,[56] failed to respond to grievances for long periods of time,[57] refused to process more than one grievance at a time,[58] and falsely represented in court that prisoners had failed to file grievances on certain claims.[59]

Even policies not purposely directed at limiting court access may impose burdens inconsistent with the Constitution and the policy of § 1983. For example, Michigan's new grievance policy, which asks (though does not necessarily require) prisoners to include names of potential defendants, could not be enforced in this case, even if it had been in effect when Petitioners grieved and even if the reviewing authorities had declined to consider the merits of the grievances. Because neither Williams nor Walton knew or could have reasonably known who the defendants were at the time they filed their grievances, a requirement to include this information would be an arbitrary denial of their right of access to the courts. *See Freeman*, 2004 WL

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the procedure, making it difficult to find" and that the Hawaii procedure was "difficult to follow").

[56] Letter from Warden of Dorchester County Detention Center to ACLU Cooperating Counsel (April 30, 2004) ("Dorchester County Policy"). The warden defended his practice on the ground that "[i]t makes no sense to fill my grievance form file with frivolous complaints just to make a few unhappy inmates happy." *Id.*

[57] *See, e.g.*, Connecticut Grievance No. M1403102 ("Connecticut Sample Grievance 1") (complains "No answer given [to] many prior requests"); Delaware Grievance No. 11116 ("Delaware Sample Grievance") (prisoner with Hepatitis C filed grievance in January 2005 that he was not receiving any treatment; grievance was not decided until April 2006; although grievance was decided in favor of prisoner, no treatment was ordered); Lee Williams & Esteban Parra, *Delaware's Deadly Prisons: Odds Against Inmates in Grievances*, Delaware News Journal (Sept. 25, 2005) (noting complaints that "it can take months – in some cases years – for complaints to be resolved").

[58] *See, e.g.*, Louisiana Grievance No. LSP-2005-1676, First Step Response Form ("Louisiana Sample Grievance 2") (stating that grievance had been "set aside" because another request was pending).

[59] *Blount v. Fleming*, No. 7:04cv00429, 2006 WL 1805853, at *3 (W.D. Va. June 29, 2006).

1774737, at *3-4 (noting that a "name all defendants" rule would require discovery in grievance systems to comport with the policies of § 1983).

There is a real danger that grievance procedures may be used to block prisoners' access to the courts. *Amici* respectfully request that the Court take the opportunity presented by this case to make clear that any grievance policy that denies prisoners an adequate opportunity to exhaust their claims and present them in court is invalid.

CONCLUSION

The decisions of the court of appeals should be reversed.

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APPENDIX

INTERESTS OF *AMICI CURIAE*

The **American Civil Liberties Union** (ACLU) is a nationwide, non-profit, nonpartisan organization of more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Consistent with that mission, the National Prison Project of the ACLU Foundation was established in 1972 to protect and promote the civil and constitutional rights of prisoners. The **American Civil Liberties Union of Michigan** is a state affiliate of the ACLU.

The **Jerome N. Frank Legal Services Organization of the Yale Law School** (LSO) provides free representation to indigent people in need of legal aid. Since 1970, LSO students have provided legal assistance to incarcerated people, first through a Prison Clinic, and now through both the Prison Clinic and the Complex Federal Litigation Clinic (CFL). Yale students have represented inmates in federal and state courts and before administrative agencies, in a range of proceedings including habeas and civil rights actions, and involving a wide variety of issues. In recent years, LSO has litigated a number of cases involving Prison Litigation Reform Act (PLRA) exhaustion.

The **Legal Aid Society of the City of New York** is a private organization that has provided free legal assistance to indigent persons in New York City for nearly 125 years. Through its Prisoners' Rights Project, the Society seeks to ensure that prisoners are afforded full protection of the constitutional and statutory rights. The Society advocates on behalf of prisoners in New York City jails and New York state prisons, and conducts litigation on prison conditions.

The **Ohio Justice & Policy Center** ("OJPC") is a non-profit, public interest law firm that litigates civil rights cases on behalf of prisoners and formerly incarcerated individuals.

Through its Grievance Project, OJPC educated the Sixth Circuit Court of Appeals about the administrative grievance systems that exist within the states comprising the Sixth Circuit. OJPC was formerly known as the Prison Reform Advocacy Center.

Prison Legal News ("PLN") is non-profit organization that advocates nationally on behalf of those imprisoned in American detention facilities. PLN publishes a magazine by the same name to educate its readers and the general public about the use of the civil justice system for the vindication of fundamental human and civil rights.

Prison Legal Services of Michigan ("PLSM") is a Michigan non-profit, tax-exempt corporation that was founded in 1976. It assists Michigan prisoners in obtaining access to courts through individual advice and self-help packets which it provides free of charge to indigent prisoners. PLSM has served as counsel for all male Michigan prisoners in a state class action. The requirements for exhaustion of administrative remedies is of critical importance to PLSM and its clients.

The **Prisons and Corrections Section of the State Bar of Michigan** provides education, information, and analysis on correctional issues in the state. Through meetings, seminars, a web-site, public service programs, and publication of a newsletter, the Section seeks to serve both its members and the public. Membership in the Section is open to all members of the State Bar of Michigan. Statements made on behalf of the Section do not necessarily reflect the views of the State Bar of Michigan.

The **Uptown People's Law Center** ("UPLC") is a non-profit legal service center serving the poor and indigent of Chicago. Among other things, the UPLC represents prisoners challenging prison conditions, parole procedures,

and "good time policies" in the Illinois prison system. UPLC frequently faces the issue of administrative exhaustion, both in its formal litigation, and in addressing the hundreds of letters it receives from unrepresented prisoners seeking advice on how to properly exhaust claims.

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Nos. 05-7058, 05-7142

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IN THE

Supreme Court of the United States

LORENZO L. JONES,

Petitioner,

v.

BARBARA BOCK, Warden, *et al.*,

Respondents.

TIMOTHY WILLIAMS,

Petitioner,

v.

WILLIAM OVERTON, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE STATES OF NEW YORK, ALABAMA, ALASKA, ARKANSAS, CALIFORNIA, COLORADO, DELAWARE, FLORIDA, HAWAII, IDAHO, ILLINOIS, MARYLAND, MISSOURI, MONTANA, NEBRASKA, NEVADA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, COMMONWEALTH OF PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, COMMONWEALTH OF VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN, WYOMING, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF THE RESPONDENTS

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STATEMENT OF INTEREST OF AMICI CURIAE

The Prison Litigation Reform Act of 1995 provides that "[n]o action shall be brought with respect to prison conditions . . . until such administrative remedies as are available are exhausted." Prison Litigation Reform Act of 1995 ("PLRA"), Pub. L. No. 104-134, § 803(d), 110 Stat. 1321-66, 1321-71 (1996), codified at 42 U.S.C. § 1997e(a). This provision replaced an earlier one under which administrative exhaustion "was in large part discretionary," *Porter v. Nussle*, 534 U.S. 516, 523 (2002), and which permitted a district court to stay a prisoner's action while administrative remedies were exhausted. Pursuant to § 1997e(a)'s "invigorated" exhaustion requirement, all available administrative remedies must now be exhausted before a prisoner can commence a federal action. *Id.* at 524. Among the issues presented in these appeals is whether the PLRA prescribes a "total exhaustion" rule, such that an action must be dismissed if the prisoner has not exhausted administrative remedies on all claims asserted in the complaint.

The *amici* States and their correctional officials are inundated with thousands of prisoner lawsuits annually. From 2000 through 2005, prisoner civil rights and prison conditions cases comprised between 8.3% and 9.8% of new filings in federal district courts, "or on average about one new prisoner case every other week for each of the nearly 1000 active and senior district judges across the country." *Woodford v. Ngo*, 126 S. Ct. 2378, 2388 n.4 (2006).

Correct resolution of this case will diminish the burdens imposed by this litigation in two ways. First, interpreting § 1997e(a) as imposing a total exhaustion requirement will maximize the incentive for prisoners to make prompt and

full use of prison grievance procedures and exhaust administrative remedies on all of their claims before joining them in an action. Prisoner grievances play an important role in prison administration by providing timely feedback to prison officials about problems that arise in correctional facilities. In individual cases, grievance procedures enable prison administrators to take prompt remedial action that may satisfy the prisoner and obviate the need for litigation. Such procedures also allow prison officials to monitor trends in prisoner complaints before unwise institutional policies or patterns of inappropriate conduct by correctional officers lead to frustration among inmates, potentially triggering prisoner unrest. Grievance procedures also allow state officials to filter out meritless claims and to create factual records of disputes that may eventually be litigated. By strongly encouraging prisoners to grieve all of their claims internally before commencing an action, the total exhaustion rule will further all these interests.

Second, a total exhaustion rule will help achieve the PLRA's important aim of increasing the quality of prisoner complaints, thereby decreasing the burden of prisoner litigation on the judiciary as well as on state correctional officials and their attorneys. Prisoners often file inartfully drafted complaints that include a number of claims, related and unrelated, spanning multiple dates and against multiple parties. If the total exhaustion rule imposed by § 1997e(a) is not applied, nothing deters prisoners from indiscriminately loading complaints with unexhausted as well as exhausted claims, leaving it to the district court, with the help of the defendants, to sort them out. Proper application of the total exhaustion rule will strongly discourage prisoners from including unexhausted claims in a complaint, promoting judicial economy and conserving the limited resources that the *amici* States expend in defending against these suits in the manner Congress intended.

SUMMARY OF ARGUMENT

Section 1997e(a) of the PLRA mandates that "[n]o action shall be brought with respect to prison conditions .. . until such administrative remedies as are available are exhausted." The plain language of this provision prohibits the commencement of an "action" with respect to prison conditions unless there has been total exhaustion of available administrative remedies on *all* claims. The general rule is that an action barred from commencement by the terms of a statute must be dismissed. Section 1997e provides for no exception to this general rule. Thus, § 1997e(a) prescribes a "total exhaustion" requirement, such that a district court must dismiss without prejudice a prisoner's action where administrative remedies have not been exhausted on all claims.

This rule markedly furthers the PLRA's goals of decreasing the quantity and increasing the quality of prisoner complaints. It maximizes the incentive for prisoners to grieve all of their claims promptly before joining them in an action, giving correction officials the earliest opportunity to resolve all of the prisoner's complaints. Thus, corrective action on meritorious claims may eliminate litigation altogether, while frivolous claims may be weeded out. Prompt and complete exhaustion of all claims also facilitates the creation of a more complete administrative record to assist the courts in resolving those claims that are ultimately litigated.

A "total exhaustion" rule also strongly discourages the indiscriminate pleading of unexhausted claims. As a result, courts and defendants are spared the time-consuming effort of ferreting out the unexhausted claims in often inartfully

drafted complaints, attention that can be better devoted to resolving exhausted claims in properly pleaded complaints. The rule may also reduce piecemeal litigation by encouraging prisoners to exhaust all claims and include them in one action with only one filing fee.

ARGUMENT

I. The Plain Language Of 42 U.S.C. § 1997e(a) Requires Total Exhaustion Of Administrative Remedies Before An "Action" May Be "Brought."

The language of § 1997e(a) is plain and it is mandatory. It provides that "[n]o action shall be brought with respect to prison conditions . . . until such administrative remedies as are available are exhausted." By using the mandatory word "shall" and the term "action" instead of "claim," and barring an action where all available administrative "remedies" — in the plural — have not been exhausted, Congress clearly expressed its intent that a prisoner must exhaust administrative remedies on all claims before commencing a suit in federal court. *See Woodford*, 126 S. Ct. at 2391 ("saying that a party may not sue in federal court *until* the party first *pursues* all available avenues of administrative review necessarily means that, if the party never pursues all available avenues of administrative review, the person will never be able to sue in federal court") (emphasis in the original). This construction is confirmed by § 1997e(c), which distinguishes between an "action" and a "claim," indicating that Congress intended the two terms to be construed differently in accordance with their usual definitions. *See* Fed. R. Civ. P. 3 ("A civil action is commenced by filing a complaint with the court."); Fed. R. Civ. P. 18(a) (party may join in a pleading "as many claims" as the party has against an opposing party); Black's Law Dictionary, at 26 (5th ed. 1979) (term action "in its usual legal sense means a suit brought in a court"); *id.* at 224 (defining "claim" as "[c]ause of action");

see also Artuz v. Bennett, 531 U.S. 4, 9-10 (2000) (relying on different meanings of terms "application" and "claim").[1]

Petitioners' rejoinder to the plain text is simply that § 1997e(a) does not direct a district court to dismiss a non-compliant action. *See* Br. 65; *see also Ortiz v. McBride*, 380 F.3d 649, 657 (2d Cir. 2004), *cert. denied*, 543 U.S. 1187 (2005); *Lira v. Herrara*, 427 F.3d 1164, 1171 (9th Cir. 2005). But no such instruction from Congress was required. This Court has instructed that "[a]s a general rule, if an action is barred by the terms of a statute, it must be dismissed." *Hallstrom v. Tillamook County*, 493 U.S. 20, 31 (1989); *accord McNeil v. United States*, 508 U.S. 106, 111, 113 (1993) ("The command that an 'action shall not be instituted . . .' is unambiguous" and "[b]ecause petitioner failed to heed that clear statutory command, the District Court properly dismissed his suit."). The logic underlying this general rule is simple: Congress does not intend that an action it prohibits from being brought at all can continue in any fashion. This rule should have even greater force in the context of a statute designed to decrease the quantity and increase the quality of prisoner lawsuits. Particularly because this Court "generally 'presumes that Congress expects its statutes to be read in conformity with the Court's precedents,'" *Porter*, 534 U.S. at 528 (*quoting United States v. Wells*, 519 U.S. 482, 495

1. Even the Second and Ninth Circuits, which have rejected the total exhaustion rule, concede that the literal terms of § 1997e(a) bar the commencement of an action with a "mixed" complaint alleging both exhausted and unexhausted claims. *See Ortiz v. McBride*, 380 F.3d 649, 657 (2d Cir. 2004) ("Section 1997e(a) clearly instructs that an action . . . containing exhausted and unexhausted claims should not have been 'brought'"), *cert. denied*, 543 U.S. 1187 (2005); *Lira v. Herrara*, 427 F.3d 1164, 1170-71 (9th Cir. 2005) ("The text of § 1997e(a) specifies a rule regarding the *instigation* of suit — that 'no action shall be brought' unless there has been exhaustion" and "[t]hat requirement necessarily applies to all claims alleged") (emphasis in the original).

(1997)), it was wholly unnecessary for Congress to have included in § 1997e(a) an explicit mandate that mixed actions be dismissed.

In any event, dismissal for noncompliance with § 1997e(a) is comfortably included within § 1997e(c)'s dismissal provisions. Section 1997e(c)(1) requires dismissal of "frivolous" actions. It provides that

> [t]he court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions . . . if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.

42 U.S.C. § 1997e(c)(1). Because a mixed action is barred from commencement by § 1997e(a), a mixed action is legally frivolous within the meaning of § 1997e(c)(1). *See Neitzke v. Williams*, 490 U.S. 319, 325 (1989) (defining "frivolous" as lacking "an arguable basis either in law or in fact"). In addition, if a statute bars commencement of an action, that action necessarily does not state any claim upon which relief can be granted by the court.

What § 1997e(c)'s dismissal provisions nowhere authorize is the procedure sanctioned by the Second and Ninth Circuits, permitting a district court to dismiss without prejudice the unexhausted claims in an improperly commenced mixed action. Section 1997e(c)(2), addressing dismissal of claims, provides that

> [i]n the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a

> defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.

42 U.S.C. § 1997e(c)(2). This provision authorizes dismissal of facially meritless claims with prejudice, "thus allowing a district court to dismiss plainly meritless claims without first addressing what may be a much more complex question, namely, whether the prisoner did in fact properly exhaust available administrative remedies." *Woodford*, 126 S. Ct. at 2392.[2] Section 1997e(c)(2) does not, however, authorize a court to prune potentially meritorious unexhausted claims from the complaint and dismiss them without prejudice, permitting the exhausted claims to go forward.

Contrary to petitioners' suggestion (Br. 68), the total exhaustion rule does not render § 1997e(c)(2) superfluous. As this Court noted in *Woodford*, § 1997e(c)(2) "serves a useful function by making it clear that the PLRA exhaustion requirement is not jurisdictional." 126 S. Ct. at 2392. Moreover, it is simply not true that "'[t]here would be little point in providing for the dismissal of some nonexhausted claims on the merits [under § 1997e(c)(2)] if the remainder of the action would then have to be dismissed, although exhausted, because of the failure to exhaust the dismissed

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2. While this provision could result in the survival of an action even though a dismissed frivolous claim might also have been shown to have been unexhausted, Congress chose not to require unnecessary expenditure of judicial resources where facial dismissal was the most efficient course of action. Thus, for example, a prisoner's claim that his rights were violated by being served creamy peanut butter instead of the chunky variety can be dismissed as frivolous without determining whether it was exhausted.

claims'" (Pet. Br. 68) (*quoting Lira*, 427 F.3d at 1172). A dismissal for lack of total exhaustion required by § 1997e(a) will, as a general rule, be without prejudice. The prisoner may attempt to commence a new action asserting both the previously-exhausted claims and any unexhausted claims that have been exhausted in the interim. Pursuant to § 1997e(c)(2), the court may, however, dismiss a particular claim with prejudice without first inquiring whether the claim was exhausted. The dismissal of that claim will be subject to *res judicata*, barring the prisoner from ever returning to court with the claim. Thus, § 1997e(c)(2) is not superfluous; it complements § 1997e(a)'s total exhaustion rule by permitting the court to dismiss a patently meritless claim on the merits, never to be resurrected, regardless of exhaustion.

Petitioners also argue (Br. 68) that if the term "action" as used in § 1997e(a) is interpreted to demand dismissal of a mixed complaint, then § 1997e(c)(1), which uses the same term, would also require dismissal of the entire complaint if any claim is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from an immune defendant, thus rendering § 1997e(c)(2) superfluous. This argument misreads § 1997e(c)(1), which mandates dismissal of the action if the court "is satisfied that the action" is frivolous, malicious, fails to state a claim upon which relief can be granted or seeks damages from an immune defendant. Thus, with respect to the underlying merits of the claims asserted, the provision requires dismissal of the action only if *all* claims fail on these grounds. With respect to exhaustion, § 1997e(a) likewise refers to an "action" as a bundle of claims in a lawsuit and bars an action until all available administrative remedies have been

exhausted. If this statutory precondition to commencement is not satisfied, dismissal of the action is required.[3]

A further question is whether § 1997e(a) requires that a mixed action be dismissed without an opportunity for the prisoner to amend the complaint. Petitioners note (Br. 76) that in the habeas corpus context, where a total exhaustion rule applies, petitioners are permitted to resubmit a petition with the unexhausted claims deleted. *See Rose v. Lundy*, 455 U.S. 509, 520-22 (1982) (plurality opinion) ("a district court must dismiss habeas petitions containing both unexhausted and exhausted claims," but the prisoner can "amend the petition to delete the unexhausted claims"); *see also Rhines v. Weber*, 544 U.S. 269, 278 (2005). If the district court finds good cause for the petitioner's failure to exhaust all claims, the court may, under limited circumstances, employ a "stay-and-abeyance" procedure, staying the habeas proceeding and holding it in abeyance while the petitioner returns to state court to exhaust his unexhausted claims. *Rhines*, 544 U.S. at 277.

This analogy, however, is inapt in light of § 1997e(a)'s text and legislative history. Section 1997e(a) was substituted for a predecessor provision that authorized district courts to stay the prisoner's action "for a period not to exceed 180

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3. Petitioners' reference to § 1997e(e) does not assist them either. The instant cases do not present the question whether an action must be dismissed because a prisoner pleads a claim "for mental or emotional injury suffered while in custody without a prior showing of physical injury," 42 U.S.C. § 1997e(e), despite the pleading of other viable claims. In any event, § 1997e(e)'s heading indicates that it is a "[l]imitation on recovery" that does not implicate the same underlying policy concerns as the total exhaustion requirement of § 1997e(a) (*see* Point II, *infra*).

days" while the prisoner exhausted administrative remedies. Civil Rights of Institutionalized Persons Act, § 7, 94 Stat. 352; *see Woodford*, 126 S. Ct. at 2382; *Porter*, 534 U.S. at 523. Thus, any argument that a stay for this purpose continues to be available is untenable.

Moreover, Congress included a different prohibition in § 1997e(a) than it did in 28 U.S.C. § 2254. Section 2254 does not explicitly bar the commencement of a habeas corpus proceeding with a mixed petition. It provides that "[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court *shall not be granted* unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A) (emphasis added); *see Rhines*, 544 U.S. at 273 ("we held in *Rose v. Lundy* . . . that federal district courts may not *adjudicate* mixed petitions for habeas corpus") (emphasis added). The habeas statute thus leaves room for an amendment of the petition or stay-and-abeyance so that the application is adjudicated only on exhausted claims.

In § 1997e(a), however, Congress used language that unambiguously precludes the commencement of an action with a mixed complaint. There is no reason that Congress would have barred commencement of a mixed action if it had intended that, once commenced, the infirmity simply could be cured by the prisoner or the court. Accordingly, this text should be given legal effect, and dismissal of a statutorily-barred action is thus the proper disposition.

II. A Total Exhaustion Rule Furthers The Policies Underlying The PLRA And § 1997e(a).

While the plain language of § 1997e(a) should be dispositive, the policies underlying the PLRA's enactment likewise weigh heavily in favor of a total exhaustion requirement. This Court has stressed "the PLRA's dominant concern to promote administrative redress, filter out groundless claims, and foster better prepared litigation of claims aired in court." *Porter*, 534 U.S. at 528. "Beyond doubt, Congress enacted § 1997e(a) to reduce the quantity and improve the quality of prisoner suits; to this purpose, Congress afforded corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case." *Id.* at 524-25.

A total exhaustion rule serves all of these goals. It promotes administrative redress by maximizing the incentive for prisoners to make prompt and full use of prison grievance procedures and exhaust administrative remedies on all claims before joining them in an action, giving prison officials an earlier opportunity to resolve all of the prisoner's complaints. *See Woodford*, 126 S. Ct. at 2387-88 (adopting construction of § 1997e(a) that "gives prisoners an effective incentive to make full use of the prison grievance process and accordingly provides prisons with a fair opportunity to correct their own errors"); *cf. Duncan v. Walker*, 533 U.S. 167, 178-80 (2001) (adopting construction of habeas corpus statute that provides a "powerful incentive" to exhaust available remedies and rejecting interpretation that "would do far less to encourage exhaustion"). The rule thus promotes federal-state comity, which "has as much relevance in areas of particular state administrative concern as it does where state judicial action is being attacked." *Preiser v. Rodriguez*, 411 U.S. 475, 491

(1973); *see Woodford*, 126 S. Ct. at 2388 ("This is particularly important in relation to state corrections systems because it is 'difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons.'") (*quoting Preiser*, 411 U.S. at 491-92).

As a result of this incentive, the total exhaustion rule will inevitably reduce the quantity and improve the quality of prisoner suits. In many cases, corrective action taken by prison officials on a prisoner's grievance that would otherwise remain unexhausted "might improve prison administration and satisfy the inmate," *Porter*, 534 U.S. at 525, so that the claim is never brought to federal court. Alternatively, administrative resolution of the claim may convince the prisoner of its lack of merit so that it does not become part of future litigation. *See id.* ("In other instances, the internal review might 'filter out some frivolous claims.'") (*quoting Booth v. Churner*, 532 U.S. 731, 737 (2001)). When a prisoner has multiple claims that are all properly grieved, favorable resolution of one or more of them may persuade the prisoner to abandon the others and not to commence a federal action at all. *See Woodford*, 126 S. Ct. at 2388 ("Proper exhaustion reduces the quantity of prisoner suits because some prisoners are successful in the administrative process, and others are persuaded by the proceedings not to file an action in federal court."). The prompt and complete exhaustion encouraged by the rule also facilitates the creation of a more accurate and complete administrative record to assist the courts in resolving claims ultimately litigated. *See id.* ("proper exhaustion often results in the creation of an administrative record that is helpful to the court" and "[w]hen a grievance is filed shortly after the event giving rise to the

grievance, witnesses can be identified and questioned while memories are still fresh, and evidence can be gathered and preserved").

Additionally, the total exhaustion rule improves the quality of prisoner suits by strongly discouraging the inclusion of unexhausted claims in a complaint. *See Porter*, 534 U.S. at 528 (dominant concern of PLRA to, *inter alia*, "foster better prepared litigation of claims aired in court"). Without the rule, district courts and defendants are left to ferret out the unexhausted claims through time-consuming motion practice. Permitting district courts simply to dismiss unexhausted claims results in a toothless scheme in which the prisoner's noncompliance with § 1997e(a) carries no sanction at all, providing no deterrence to the pleading of unexhausted claims. *See Woodford*, 126 S. Ct. at 2388 (declining to adopt interpretation of § 1997e(a) that "carries no significant sanction" for noncompliance).

While petitioners note that the prisoner may just file another action with only the exhausted claims, the prisoner will be assessed another filing fee, *see* 28 U.S.C. § 1915(b)(1), providing a financial disincentive to including the unexhausted claims in the first action. Statutes of limitations may provide an added incentive for prisoners not to allege unexhausted claims and have an action dismissed on this basis.[4] Thus, the total exhaustion rule will

4. The statute of limitations for section 1983 claims "is generally the applicable state-law period for personal-injury torts," *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 123 n.5 (2005), and state tolling provisions may permit a prisoner to recommence an action on exhausted claims dismissed for lack of total exhaustion, notwithstanding that the statute of limitations has run in the interim. *See, e.g.*, N.Y. C.P.L.R. 205(a).

meaningfully improve the quality of prisoner complaints, as Congress intended, by forcing a prisoner to think twice before pleading unexhausted claims. *See Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 398 (1990) ("The filing of complaints, papers, or other motions without taking the necessary care in their preparation is a separate abuse of the judicial system"). The time that district courts and defendants would spend culling unexhausted claims from mixed complaints can be better spent on resolving exhausted claims in properly pleaded, potentially meritorious complaints.

The total exhaustion rule promotes judicial economy in other ways as well. Because an action must be dismissed once the court identifies one unexhausted claim, the court and defendants are spared the time-consuming effort of determining whether every other claim in the complaint has been exhausted. In addition, the rule may serve to discourage piecemeal litigation, an especially important objective when claims are factually or legally related. Knowing that a mixed action will be dismissed, the prisoner is strongly encouraged to exhaust all claims initially and include them in one action with only one filing fee to be paid. *See Rose*, 455 U.S. at 520 ("Rather than increasing the burden on federal courts, strict enforcement of the exhaustion requirement will encourage habeas petitioners to exhaust all of their claims in state court and to present the federal court with a single habeas petition."). By mandating that "[n]o action shall be brought" until all administrative remedies have been exhausted, Congress intended to avoid the inefficiency that would result if a prisoner can litigate the exhausted claims in a mixed complaint and then bring related claims if and when they have been exhausted. *See id.* ("To the extent that the exhaustion requirement reduces piecemeal litigation, both the courts and the prisoners should benefit, for as a result

the district court will be more likely to review all of the prisoner's claims in a single proceeding, thus providing for a more focused and thorough review."). Thus, "[t]he interest in orderly administration of this body of litigation is best served by adherence to the straightforward statutory command." *McNeil*, 508 U.S. at 112.

Finally, petitioners' view that the total exhaustion rule is too harsh for prisoners was rejected by Congress when it enacted § 1997e(a). The total exhaustion rule provides "a simple and clear instruction to potential litigants," *Rose*, 455 U.S. at 520: before you commence an action in federal court, make sure that you have administratively exhausted all of your claims in the prison system. Even *pro se* prisoners should "be able to master this straightforward exhaustion requirement," *id.*, that they are already acquainted with from the habeas corpus context. *See Woodford*, 126 S. Ct. at 2393 (rejecting argument that requiring proper exhaustion is unduly harsh for prisoners, in light of the "informality and relative simplicity of prison grievance systems" and "the fact that prisoners who litigate in federal court generally proceed *pro se* and are forced to comply with numerous unforgiving deadlines and other procedural requirements").[5]

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5. Notably, *pro se* prisoner complaint forms provided by district courts to prisoners place them on notice of this requirement by directing the prisoner to allege the manner in which he grieved each claim and the result. *See, e.g.*, United States District Court for the Western District of New York Prisoner Complaint Form, *at* http://www.nywd.uscourts.gov/document/PrisonerComplaintForm.pdf; United States District Court for the Northern District of New York Inmate Civil Rights Complaint Pursuant to 42 U.S.C. § 1983, *at* http://www.nynd.uscourts.gov/pdf/inmatciv.pdf.

CONCLUSION

For the foregoing reasons, this Court should hold that the PLRA prescribes a total exhaustion rule that requires a district court to dismiss a prisoner's action when the complaint contains any unexhausted claims.

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